
**INTERNATIONAL CIVIL DISOBEDIENCE: UNAUTHORIZED
INTERVENTION AND THE CONSCIENCE OF THE
INTERNATIONAL COMMUNITY**

NATHAN J. MILLER*

ABSTRACT

This Article offers a theory of international civil disobedience under which a state could stage an unlawful military intervention to stop massive human rights abuses without sacrificing its respect for the rule of international law—if the intervention conformed to the characteristics that distinguish international civil disobedience from other types of illegal conduct. These are publicity, conscientiousness, a preference for non-violence, and willingness to accept the legal consequences of the disobedient act. These requirements collectively set an appropriately high bar for the use of force outside the constraints of the Charter of the United Nations. A state meeting that bar, however, would have a claim to moral standing unavailable to other violators of the prohibition of the use of force.

The demands of public morality and the demands of international law conflict in cases where the former compels military intervention to end mass atrocities and the latter forbids that intervention. On most accounts, concerned states would therefore be forced to choose between two unattractive options. Violating the prohibition of the use of force would weaken a foundational norm of the modern international system and undermine the claim of international law to be able to constrain the behavior of states. Refraining from intervening despite strong moral reasons to do so would de-legitimize international law, showing it to be a system unable to implement the fundamental principles on which it claims to be based. This Article offers a potential solution to that dilemma.

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* Director, International Legal Clinic and Assistant Director, University of Iowa Center for Human Rights, University of Iowa College of Law. Inexpressibly many thanks are due, as always, to Professor Maya Steinitz for her support and encouragement. Thanks are also due to Jason Emmanuel, Cindy Alkiss, and Shefali Aurora whose able research assistance contributed immensely to the completion of this Article. Gratitude is also due to Steve Burton, Paul Gowder, Song Richardson, and Alexander Somek for their careful reading and insightful comments.

I. INTRODUCTION

[A]n individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Martin Luther King, Jr.¹

This Article argues that states motivated to use military force to stop massive human rights violations but loath to violate international law do not need to choose between saving lives and upholding the rule of law. Rather, states can do both by engaging in a kind of principled disregard of the law. This Article will refer to that principled disregard as “international civil disobedience” but will acknowledge that the dissimilarities between the domestic and international context are such that the term “civil disobedience” may work more as an analogy than by direct application.

Consider three contrasting scenarios. In the first, a government rains horror down on the civilians entrusted to its care. Hundreds of thousands are killed. Shopkeepers are choked on poison gas, schoolteachers tortured to death, and farmers bombed to dust by the very authorities charged with protecting their human rights. Millions run from their homes. In response, the United States seeks authorization for military intervention from the United Nations Security Council but the Security Council rejects the request. Nonetheless, the United States—perhaps with some allies, perhaps not—attacks the offending regime intending to end, or at least significantly curb, the violence. But in so doing it contravenes, and thereby undermines, one of the bedrock norms of international law—the prohibition on the use of force. This hypothetical scenario is, of course, not dissimilar from what almost happened in Syria in late 2013² (and what, arguably, is happening at the end of 2014),³ when

1. Letter from Birmingham Jail (Apr. 16, 1963).

2. Anne Gearan, *Diplomacy Is Failing in Syria, Obama Acknowledges*, WASH. POST (Feb. 11, 2014), http://www.washingtonpost.com/world/national-security/diplomacy-is-failing-in-syria-obama-acknowledges/2014/02/11/822065e6-935c-11e3-84e1-27626c5ef5fb_story.html.

3. At the time of this writing, the United States is conducting an air campaign against a rebel group—variously referred to as the Islamic State in Iraq and Syria (“ISIS”) and the Islamic State in Iraq and the Levant—in Syria. See, e.g., *U.S., Allies Launch Barrage of Airstrikes Against Islamic State*, REUTERS (Nov. 10, 2014), <http://www.reuters.com/article/2014/11/10/us-mideast-crisis-usa-airstrikes-idUSKCN0IU1KU20141110>. While the legality of particular military operations is beyond

the Obama administration called for military intervention in the Syrian civil war, notwithstanding the impossibility of authorization from the Security Council.⁴

Although calling for an attack that would violate the prohibition on the use of force under the Charter of the United Nations (“U.N. Charter”),⁵ the Obama administration never offered a legal justification. Nor did it clarify how its calls for Syrian accountability to international legal standards squared with its own apparent intention to violate one of the most important of those standards. For those concerned with the legitimacy and integrity of international law, with the reputation of the United States and its ability to conduct foreign policy, or with the consequences of weakening the legal prohibition on the use of force, leaving the issue unresolved in that way was, and is, deeply troubling.

In the second, very real, scenario, genocide was brewing in Rwanda. Agents on the ground informed the United States, the United Nations, and other powerful members of the international community of the impending catastrophe.⁶ Yet they did nothing. Genocidaires butchered nearly a million people in the space of 100 days.⁷ Remorseful participants and meticulous researchers later exposed the political calculus behind the Clinton administration’s refusal to intervene, to the enduring shame of the United States.⁸

the scope of this Article, it is worth noting that the argument presented herein focuses on military intervention in *internal* conflict. When more than one state is involved, as with ISIS, which operates in both Syria and Iraq, the analysis changes. It is possible to argue, for instance, that Iraq’s invitation to the United States to participate in its self-defense against ISIS includes a limited right to pursue ISIS forces within Syria. See, e.g., Ryan Goodman, *International Law on Airstrikes Against ISIS in Syria*, JUST SECURITY (Aug. 28, 2014), <http://justsecurity.org/14414/international-law-airstrikes-isis-syria/>.

4. Mark Landler, David E. Sanger & Thom Shanker, *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES (Aug. 29, 2013), http://www.nytimes.com/2013/08/30/us/politics/obama-syria.html?pagewanted=all&_r=0.

5. See *infra* note 73 and accompanying text.

6. General Roméo Dallaire, the Canadian military commander of the United Nations peacekeeping mission in Rwanda, repeatedly warned of impending disaster. In one of his most famous communications, the “genocide fax,” he wrote about an informant who reported that “he ha[d] been ordered to register all Tutsi in Kigali. He suspects it is for their extermination. Example he gave was that in 20 minutes his personnel could kill up to 1000 Tutsis.” Michael Dobbs, *The Rwanda “Genocide Fax,” #RWANDA20YRS* (Jan. 9, 2014), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB452/>; see also ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004).

7. *Rwanda: How the Genocide Happened*, BBC NEWS (Dec. 18, 2008), <http://news.bbc.co.uk/2/hi/1288230.stm>.

8. MICHAEL BARNETT, *EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA* 71, 143–44 (2002); SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND

Two decades later, the region remains in conflict spurred and maintained in part by regional and international dynamics emerging from the genocide.⁹

To date the two options described in the foregoing scenarios have been the only ones open to any potential intervener concerned to uphold international law yet faced with both massive human rights abuses and an intransigent Security Council. Law-abiding interventionists in that situation face an impossible choice between competing moral imperatives to respect the rule of law and to stop atrocities.¹⁰

This Article offers a possible third option. Imagine that the next time (and there will be a next time) a government kills and tortures massive numbers of its own citizens while a paralyzed Security Council sits passively by, the United States uses military force to stop the atrocities notwithstanding its lack of authorization to do so. But instead of leaving the issue of its unauthorized intervention unresolved, the United States acknowledges its responsibility under international law by accepting the jurisdiction of the International Court of Justice (“ICJ”) for disputes arising from its actions. Imagine further that in any proceedings in the ICJ the United States concedes responsibility—acknowledges that its conduct amounted to an internationally wrongful act—and only contests the amount of the damages it might owe the opposing state. Then the ICJ, applying the clean hands doctrine, finds that the state committing the atrocities lacks the standing to recover damages and the United States pays nothing. The differences between this scenario and the cases of Syria and Rwanda are that the former two create a dilemma for international law, tarnish the reputation of the United States whichever path it takes, and diminish its ability to conduct effective

THE AGE OF GENOCIDE 334–35 (2002); Samantha Power, *Bystanders to Genocide*, ATLANTIC MONTHLY, Sept. 2001, at 84, 86, 97–98. Five years after the genocide, former President Clinton apologized directly to the people of Rwanda. John Ryle, *A Sorry Apology from Clinton*, GUARDIAN (Apr. 13, 1998), <http://www.theguardian.com/Columnists/Column/0,5673,234216,00.html>.

9. Chris McGreal, *Rwanda’s Genocide and the Bloody Legacy of Anglo-American Guilt*, GUARDIAN (Dec. 12, 2012), <http://www.theguardian.com/commentsfree/2012/dec/12/rwanda-genocide-bloody-legacy-angloamerican-guilt>; Jason K. Stearns, *Rwandan Ghosts*, FOREIGN POL’Y (Nov. 29, 2012), http://www.foreignpolicy.com/articles/2012/11/29/rwandan_ghosts.

10. A potential intervener unconcerned with international law, or concerned with it only as a suggestion to be taken up or not, would of course face no such choice. This Article is not aimed at the unconcerned; rather, it assumes that states for the most part wish to adhere to international law and certainly to refrain from undermining its central tenets. For further discussion see *infra* Part II.E.

foreign policy, while the latter solves that dilemma, preserves the reputation of the United States, and gives it the moral high ground in future debates about the appropriate use of force in defense of human rights.

This Article offers a theory of international civil disobedience, or principled disregard of international law, which may help solve the dilemma that arises when egregious human rights abuses demand military intervention to end them but the Security Council is unwilling to issue legal authorization for that intervention. States considering whether to intervene to stop such abuses seem to be in a position to act morally or legally, but not both. Such situations pit one set of moral intuitions (preserve life in the face of atrocities) against another (uphold the rule of law).

Both choices risk damage to the intervening state's international reputation and undermine its ability to secure, in the medium and long term, the very legal and moral interests that underlie the dilemma. Choosing to ignore moral imperatives and follow the law (by not intervening) would de-legitimize international law, showing it to be a system unable to implement the fundamental principles on which it claims to be based.¹¹ Yet choosing to ignore the law and follow moral imperatives (by intervening) would undermine one of the foundational norms of modern international law by subordinating the prohibition of the use of force to the non-legal judgments of states. That prohibition is the cornerstone of a modern international order which privileges diplomacy and the peaceful settlement of disputes over violence. In that respect the modern system is rightly viewed by many as a watershed in human development. It replaced law permitting the waging of war as a way to vindicate states' international legal rights or even to pursue their political agendas.¹²

11. In his retrospective on recourse to force published shortly after the NATO bombing of Kosovo, Tom Franck likened this result to the one where a child, forbidden by his father to see a neighbor boy, nonetheless saves the neighbor from drowning one afternoon and is severely punished for disobeying his father. "Law—or, in this example, parental authority—does not thrive when its implementation produces *reductio ad absurdum*: when it grossly offends most persons' common moral sense of what is *right*." THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 178 (2002).

12. In the late nineteenth and early twentieth centuries states enjoyed unfettered discretion under international law to make war for any reason or for no reason. Before that, the legality of war was governed by the labyrinthine and easily manipulated *jus ad bellum*, which, among other things, allowed a state whose international legal rights had been infringed upon to resort to the use of force as a form of "self-help." The adoption of the U.N. Charter marked the transition from the system of self-help and the use of force as punishment to a system of diplomacy and the use of force as a last resort. Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57, 63, 70, 72 (2013).

Choosing to intervene would also give fodder to the argument that international law as a system lacks the ability to ensure compliance and is therefore more a disguise for power than it is a kind of law.¹³

This Article takes it as a given that situations horrifying enough to prompt calls for military intervention will continue to arise. For the first several decades of the Charter era, unauthorized intervention was rare.¹⁴ But since the end of the Cold War, several states have undertaken unauthorized military interventions, including the United States, France, and the United Kingdom in northern Iraq in 1991;¹⁵ the decade-long ECOMOG operation in Sierra Leone and Liberia;¹⁶ the NATO air campaign in Kosovo in 1999;¹⁷ the U.S.-led invasion of Iraq in 2003;¹⁸ the Russian attacks in Georgia in 2008;¹⁹ and the U.S. intervention in Libya in 2011. The United States was within a hair's breadth of launching an attack on Syria before Russia brokered a diplomatic solution. Although that diplomatic solution seems to have held, at least with respect to the United States attacking the state of Syria, at the time of this writing the United States is

13. David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 473 (2001) ("All that matters, according to the realists (whether classical or structural), is power. In their view, legalities can never constrain power."); Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 562–63 (2004) ("Without guaranteed enforcement by an international sovereign, states must preserve their relative power or risk increasing insecurity. There may be rules or law to which nations subscribe, but, as the theory goes, ultimately powerful nations will avoid complying with rules that diminish their relative power.").

14. See SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?* (2001); FRANCK, *supra* note 11; Tonny Brems Knudsen, *The History of Humanitarian Intervention: The Rule or the Exception?* 33 (Feb. 15, 2009) (unpublished manuscript) (on file with the Aarhus University Department of Political Science and Government), available at http://citation.allacademic.com/meta/p370801_index.html.

15. See generally Matthew C. Cooper, *A Note to States Defending Humanitarian Intervention: Examining Viable Arguments Before the International Court of Justice*, 40 DENV. J. INT'L L. & POL'Y 167, 187 (2012); *No Fly Zones: The Legal Position*, BBC NEWS (Feb. 19, 2001), http://news.bbc.co.uk/2/hi/middle_east/1175950.stm.

16. Cooper, *supra* note 15, at 187; *Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights*, 5 HUM. RTS. WATCH REP. 155–62 (1993), available at <http://www.hrw.org/reports/1993/liberia/>.

17. Cooper, *supra* note 15, at 190; Colum Lynch & Karen DeYoung, *U.S. Explores Possible Legal Justifications for Strike on Syria*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/world/national-security/us-explores-possible-legal-justifications-for-strike-on-syria/2013/08/28/0d9c6c08-0fe3-11e3-bdf6-e4fc677d94a1_story.html.

18. Lynch & DeYoung, *supra* note 17.

19. This example may strike some readers as anomalous. For additional discussion see *infra* note 129 and accompanying text.

conducting airstrikes within Syrian territory, aimed at the insurgent group ISIS.²⁰

Nor is Syria the only place where civilians are suffering massive human rights violations at the hands of their government. At the end of 2013, reports of ethnically motivated massacres of civilians surfaced in South Sudan²¹—a country of significant strategic interest to the United States.²² In the Central African Republic, government-affiliated Muslim militias initiated ethnic and religious violence which has spiraled out of control and brought the country to the brink of chaos.²³ The U.S. government is increasingly taking the position that such atrocities are a threat to its own national security.²⁴

Taking future unauthorized intervention as a given, this Article discusses not whether it is, or can be, the right option but rather whether the inevitable practice can be understood in a way that has the least impact on either the vitality of the prohibition of the use of force or the legitimacy of international law. Commentators have

20. *Anne-Marie Slaughter in Davos: Middle East Diplomacy Must be Backed by Threats of Force*, HUFFINGTON POST (Jan. 24, 2014), http://www.huffingtonpost.com/2014/01/24/anne-marie-slaughter-davos-middle-east-diplomacy_n_4659428.html.

21. *South Sudan: Ethnic Targeting, Widespread Killings*, HUM. RTS. WATCH (Jan. 16, 2014), <http://www.hrw.org/news/2014/01/16/south-sudan-ethnic-targeting-widespread-killings>.

22. The United States has been a strong supporter of South Sudan through three successive Presidents. Rebecca Hamilton, *U.S. Played Key Role in Southern Sudan's Long Journey to Independence*, ATLANTIC (July 9, 2011), <http://www.theatlantic.com/international/archive/2011/07/us-played-key-role-in-southern-sudans-long-journey-to-independence/241660/>. The support springs from several key strategic and political interests, including promoting a Western-leaning, democratic country in a largely undemocratic region of the world; protecting the predominantly Christian population of the South from religious persecution by the mostly Muslim population of the North; protecting the overwhelmingly black African population of the South from the Arab-identified elites in the North; and ensuring access to South Sudan's significant oil reserves. For an excellent overview of how all these issues were at stake in Sudan's Civil War, see INT'L CRISIS GRP., *GOD, OIL, AND COUNTRY* (2002), available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/God%20Oil%20and%20Country%20Changing%20the%20Logic%20of%20War%20in%20Sudan.pdf>.

23. Divya Avasthy, *Central African Republic Ethnic Conflict Claims More Lives*, INT'L BUS. TIMES (Feb. 1, 2014), <http://www.ibtimes.co.uk/central-african-republic-ethnic-conflict-claims-more-lives-1434733>.

24. *Annual Threat Assessment of the US Intelligence Community for the Senate Select Committee on Intelligence: Hearing Before the S. Select Comm. on Intelligence*, 111th Cong. 37 (2010) (statement of Dennis C. Blair, Director of National Intelligence) (mass killing as national security threat); see also Michael Abramowitz & Lawrence Woocher, *How Genocide Became a National Security Threat*, FOREIGN POL'Y (Feb. 26, 2010), http://www.foreignpolicy.com/articles/2010/02/26/how_genocide_became_a_national_security_threat.

raised several strong objections to unauthorized military intervention—even for humanitarian reasons. From the political science perspective, there is evidence that intervention in civil wars prolongs rather than abbreviates those wars.²⁵ As the war in Iraq amply demonstrated, military action can have unintended consequences. That is true even where the intervening state has the best of intentions; yet many would doubt the good intentions of the United States and other strong, interventionist states.²⁶ Evaluating those salient objections is outside the scope of this Article, which places itself firmly in the realm of non-ideal theory: how can unauthorized military intervention best fit with other permanent features of the international system such as the prohibition on the use of force and the rule of international law?

To accomplish that, this Article will formulate a theory of principled disregard of international law (or international civil disobedience) under which an intervening state could simultaneously violate and uphold international law. Part II will use the recent example of Syria to illustrate the dilemma that arises from the moral case *for* military intervention and the legal case *against* such intervention absent Security Council authorization. Part III will begin to solve that dilemma by offering a theory of international civil disobedience that requires publicity, conscientiousness, a preference for non-violence, and acceptance of legal consequences. Part IV will then provide a blueprint for a civilly disobedient military intervention and consider some potential objections and implications.

II. STOPPING ATROCITIES, RESPECTING THE RULE OF LAW: ONE OR THE OTHER?

The recent example of Syria shows that sometimes military intervention is morally desirable but nonetheless illegal under

25. Patrick M. Regan, *Third-Party Interventions and the Duration of Intrastate Conflicts*, 46 J. CONFLICT RESOL. 55 (2002); Ibrahim A. Elbadawi & Nicholas Sambanis, *External Interventions and the Duration of Civil Wars* 10 (World Bank Working Paper Series, Mar. 18–19, 2000), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2433>. The increase in human suffering of a prolonged war would seem to cut against the stated benefits of humanitarian intervention.

26. Russia and China have certainly taken the position that the United States is coming to the table with unclean hands. Bernard Gwertzman, *Why Russia Won't Yield on Syria*, COUNCIL ON FOREIGN REL. (July 17, 2012), <http://www.cfr.org/russian-federation/why-russia-wont-yield-syria/p28712>; Holly Yan, *Syria Allies: Why Russia, Iran and China Are Standing by the Regime*, CNN (Aug. 29, 2013), <http://www.cnn.com/2013/08/29/world/meast/syria-iran-china-russia-supporters/>; see also Noam Chomsky, *Gifford Lecture at the University of Edinburgh: Illegal but Legitimate A Dubious Doctrine for the Times*, YOUTUBE (Mar. 22, 2005), <http://youtu.be/xEvIDiVheys>.

international law. The United States chose not to bomb Syria in 2013, instead accepting a diplomatic solution that involved inspecting and destroying Syria's chemical weapons.²⁷ But the events of 2013²⁸ in Syria focused the attention of the world to a rare degree on related questions of international law and political morality: could the use of force by the United States against Syria be legally justified? Morally? What if there were a moral justification without a legal one? Several answers to those questions were offered by the Obama administration, its allies, and supporters of intervention from the academy and civil society. Perhaps the prohibition of the use of force is not as absolute as is commonly believed.²⁹ Or maybe the dysfunction of the Security Council, in the form of a near-certain veto by Russia and China, would somehow permit a member state to exercise the Council's obstructed authority.³⁰ What of humanitarian intervention to protect the rights of Syria's dying and displaced civilians?³¹ Or punishment

27. See Anne Barnard, *Syria Destroys Chemical Sites, Inspectors Say*, N.Y. TIMES (Oct. 31, 2013), <http://www.nytimes.com/2013/11/01/world/middleeast/syria.html> (reporting on weapons inspectors' confirmation that Syria's ability to produce chemical weapons was destroyed, as well as the "unexpectedly robust cooperation" by Assad's government "with a Russian-United States accord to dismantle his arsenal"); see also Giada Zampano, *Italy Picks Port for Transit of Syria Chemical Weapons*, WALL ST. J. (Jan. 16, 2014), <http://online.wsj.com/news/articles/SB10001424052702304149404579324670785232180> (describing the final plans for the destruction of Syrian chemical weapons, brought to international waters aboard Danish and U.S. vessels). The prospect of an attack is not, however, over. Recall that weapons inspections began in Iraq in late 2002. Although Iraq cooperated with the inspectors, the American-led military coalition invaded only four months later. *Iraq WMD Timeline: How the Mystery Unraveled*, NAT'L PUB. RADIO (Nov. 15, 2005), <http://www.npr.org/templates/story/story.php?storyId=4996218>.

28. The events of 2014 present somewhat different questions. See *supra* note 3.

29. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <http://justsecurity.org/2013/10/02/koh-syria-part2/>.

30. See Jonathan Easley, *Power Assails 'Paralyzed' U.N. in Making Case for Strike*, THE HILL (Sept. 6, 2013), <http://thehill.com/policy/international/320765-power-assails-paralyzed-un-in-making-case-for-unilateral-military-strike> ("President Obama's ambassador to the United Nations on Friday laid out the administration's case for a 'swift, limited and proportionate strike' in Syria, stressing that the United States was forced to act on its own because the U.N. was powerless in the face of opposition from Russia and China.").

31. See Lynch & DeYoung, *supra* note 17 ("French President François Hollande invoked the responsibility-to-protect doctrine in making his case to 'punish those who took the decision to harm the innocent.'"); see also PRIME MINISTER'S OFFICE, 10 DOWNING STREET, CHEMICAL WEAPON USE BY SYRIAN REGIME: UK GOVERNMENT LEGAL POSITION (2013), [available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf) ("[T]he legal basis for military action would be humanitarian intervention; the aim is to relieve humanitarian suffering by deterring or disrupting the further use of chemical weapons.").

for Syria's violation of the ban on chemical weapons?³² Despite the moral imperative to save Syrian civilians from further harm, none of these theories offer adequate legal justification for an attack.

A. *World in Progress: The Changing Dynamics of Sovereignty and the Case for (Occasional) Intervention*

International law is in the process of adapting to contemporary challenges to the foundational norm of the Charter system, which prohibits the use of force except in self-defense or when force is authorized by the Security Council (and, by extension, conforms with the political desires of the United States, the United Kingdom, France, Russia, and China, each of which wields a veto in the Council). But the pace of international legal change is measured in decades at its fastest. In the meantime states are left with legal tools that are inadequate for addressing many, if not most, of the situations in which states might consider the use of force. Thus, international law is shut out of the discourse on issues of global importance; and the design of appropriate legal doctrines is paralyzed. The morality and utility of military intervention, whether authorized by the Security Council or not, are hotly contested.³³ Certainly paper-thin contentions of humanitarian concern have been used as justification for self-interested and ultimately devastating military adventures. Notable in this regard are the U.S. invasion of Iraq in 2003, Russia's interventions in Georgia in 2008 and the Ukraine in 2014, and NATO's exercise in regime change in Libya in 2011. Other interventions have met with more approval. NATO's air campaign in Kosovo, albeit unauthorized, was warmly welcomed by the majority of Kosovar Albanians (who continue to approve of the U.S. government at among the highest rates in the world).³⁴ The operation of

32. It is imperative to note here that the ban on the stockpiling and use of chemical weapons arises from the Chemical Weapons Convention, to which Syria was not a party at the time. Conventional wisdom holds that the ban has risen to the level of customary international law. *Customary International Humanitarian Law Database: Rule 74. Chemical Weapons*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule74 (last visited Oct. 9, 2014). However, no authoritative determination—opposable to Syria—has even been made to that effect. See *infra* Part II.D.

33. See generally RICHARD FALK, HUMANITARIAN INTERVENTION AND LEGITIMACY WARS: SEEKING PEACE AND JUSTICE IN THE 21ST CENTURY (2015). I am grateful to Richard Falk for providing me with an early draft of his manuscript and to my colleague Burns H. Weston for bringing it to my attention.

34. CYNTHIA ENGLISH & JULIE RAY, SUB-SAHARAN AFRICA LEADS WORLD IN U.S. APPROVAL, GALLUP GLOBAL REP. (2010), available at <http://www.gallup.com/poll/134102/sub-saharan-africa-leads-world-approval.aspx>.

ECOMOG in Liberia and Sierra Leone³⁵ and the defense of the Kurds by the United States, the United Kingdom, and France after Operation Desert Storm are examples of interventions that were, if not totally uncontroversial, better regarded than others and that seemed, partially at least, to achieve the humanitarian objectives they set out. The increasing prominence of human rights discourse, the fraying of state sovereignty in the aftermath of the Cold War, and the concomitant rise of non-state actors, undermined the status quo. For most of the Charter era, powerful states occasionally engaged in military diplomacy and the international community granted the intervention greater or lesser degrees of approval or approbation, thereby establishing an informal system of judgment and precedent.³⁶

But the stakes have been raised in two important ways which, although pulling in different directions, each call into question the continued viability of the present system for managing the international use of force. The first is the rise of human rights. Since the entry into force of the first major international human rights treaties in 1976,³⁷ human rights have gained prominence in world affairs. That trend has culminated in calls from powerless and powerful states alike for the use of all available measures, including force if necessary, to protect individuals from massive human rights violations perpetrated by their governments. This is a complete inversion of the relative weights assigned to human rights on the one hand, and international peace and security on the other, in the U.N. Charter. While it mentioned human rights as a guiding principle, the Charter and the institutional apparatus of the U.N. was predominantly dedicated to managing the use of force by member states. The second important trend in this regard is the fraying of the international political order held together by the tensions of the Cold War. That tension released, arbitrary borders drawn by colonial and imperial powers are being challenged by sub- and supra-state entities claiming group identities of sufficient strength and legitimacy to justify violent self-determination. Unsurprisingly, religion and

35. *See generally* ADEKEYE ADEBAJO, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU (2002).

36. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 162 (2002) (describing interventions in Liberia and Sierra Leone as demonstrating “the reticent UN system’s increasing propensity to let regional organizations use force, even absent specific prior Security Council authorization, when that seemed the only way to respond to impending humanitarian disasters”).

37. *See generally* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

ethnicity play a large role in such claims, from South Sudan to the former Yugoslavia, to Syria and Iraq.

International law should constrain the power of states, restrain their worst impulses to visit violence and injustice on one another and on their citizens, and provide both practical and normative guidelines for peaceful coexistence. The existing system tried to do just that, by outlawing what the architects of the Charter system understood as the main threat to international peace and security—classical interstate violence—and by funneling the remaining choices through the political preferences of the permanent members of the Security Council. But that simple, blanket prohibition is inadequate today. To meet the new challenges posed by the demand for the protection of human rights and by frayed sovereignty, international law needs to develop a more nuanced, case-by-case approach that can provide answers to important questions. Can interventions ever be justified? If so, what is a good intervention and what is a bad one? Current international *legal* discourse fails to address these questions because it is forced into the constricting binaries of self-defense vs. aggression and unauthorized vs. authorized. International lawyers therefore cede ground to politicians, philosophers, and political theorists in debates about some of the most important issues facing international society. Notions such as “illegal but legitimate,” first deployed in the aftermath of the NATO intervention in Kosovo and recently revived with regard to Syria, can be read as attempts to escape the straightjacket of the Charter system and to regain for international law some of the ground it has lost. But such attempts fall flat since they ultimately set aside international law as normatively inferior to whichever system was understood to produce the kind of legitimacy that could withstand illegality. Another such escape attempt is the development of the principle of the responsibility to protect (“R2P”). But while a review of the history of R2P makes a strong case that the international community is developing a consensus about the need to, in extreme circumstances, use force to stop massive human rights abuses, that consensus has yet to coalesce in to legal rules. International law may yet incorporate R2P or some other set of principles that provide adequate guidance to states, but until that happens, the competition between the Charter rules and contemporary realities will continue to pose a dilemma for states. It is that dilemma that this Article attempts to address, in a way that helps resolve the tension between the duty to uphold the rule of law and the duty to stop massive violations of human rights.

The conflict in Syria is precisely the kind of disaster that gives rise to moral reasons to intervene according to the emerging consensus on humanitarian intervention and the responsibility to protect. Since the conflict in Syria began in March of 2011, more than 140,000 people have reportedly been killed,³⁸ including more than 11,000 children.³⁹ Children, including infants, have been targeted by snipers, summarily executed, and tortured.⁴⁰ While many of the dead were fighting either for or against the Syrian regime, some estimates place the number of civilian dead at more than fifty percent of the total, or more than 71,000.⁴¹ In August of 2013, the Syrian regime killed nearly 1,500 civilians with poison gas.⁴² Credible evidence suggests that the Syrian regime systematically tortured, starved, and executed at least 11,000 people, then fabricated evidence that they died in hospitals.⁴³

For those left alive the situation is grim. Both the regime and the opposition are using thirst, starvation, and homelessness as weapons of war.⁴⁴ At the time of this writing, the Syrian civil war has produced

38. Erika Solomon, *Syria's Death Toll Now Exceeds 140,000: Activist Group*, REUTERS (Feb. 15, 2014), <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>. That number was provided by an activist group, the Syrian Observatory for Human Rights. *Id.* The United Nations stopped issuing casualty estimates in the summer of 2013 due to the difficulty of obtaining accurate data. Laura Stampler, *U.N. to Stop Updating Syria Death Toll*, TIME (Jan. 7, 2014), <http://world.time.com/2014/01/07/un-to-stop-updating-syria-death-toll>.

39. HAMIT DARDAGAN & HANA SALAMA, OXFORD RESEARCH GRP., *STOLEN FUTURES: THE HIDDEN TOLL OF CHILD CASUALTIES IN SYRIA 3* (2013), *available at* http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/stolen_futures.

40. *Id.* at 13.

41. *More than 140 Thousands Have Died Since the Beginning of the Syrian Revolution*, SYRIAN OBSERVATORY FOR HUMAN RIGHTS (Feb. 15, 2014), syriaohr.com/en/ (page removed, on file with author). One should note these numbers have not been independently verified. *See id.* However they have still been reported in news outlets. *See, e.g.*, Solomon *supra* note 38.

42. Joby Warrick, *More Than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says*, WASH. POST (Aug. 30, 2013), http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html.

43. DESMOND DE SILVA ET AL., CARTER-RUCK & CO., *A REPORT INTO THE CREDIBILITY OF CERTAIN EVIDENCE WITH REGARD TO TORTURE AND EXECUTION OF PERSONS INCARCERATED BY THE CURRENT SYRIAN REGIME 4–21* (Jan. 2014), *available at* http://www.carter-ruck.com/Documents/Syria_Report-January_2014.pdf. The report concludes that “[t]he inquiry team is satisfied that upon the material it has reviewed there is clear evidence, capable of being believed by a tribunal of fact in a court of law, of systematic torture and killing of detained persons by the agents of the Syrian government.” *Id.* at 21.

44. *See* U.N. Office of the High Comm’r for Human Rights, *Deprivation of Food, Water, Shelter and Medical Care—A Method of War in Syria, and a Crime Against Humanity*

10.8 million people in need of humanitarian assistance inside Syria, including nearly 6.5 million internally displaced persons,⁴⁵ and sent 2.9 million refugees fleeing to neighboring countries.⁴⁶ U.S. Ambassador Samantha Power remarked to the Security Council in February of 2014 that “[i]n Syria we are witnessing the worst humanitarian crisis we have seen in a generation.”⁴⁷

But Syria is not the first conflict that has generated calls for intervention to protect innocent civilians. At the end of the 1990s—a decade marked by ethnic cleansing and rape camps in the Former Yugoslavia, genocide in Rwanda, and still more ethnic cleansing in Kosovo—the international community began to pay serious attention to the circumstances under which states should be called upon to use force to stop another state from killing and torturing its citizens. As then-Secretary General Kofi Annan remarked, “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend *every precept of our common humanity?*”⁴⁸

It is sometimes difficult to recall because of the extraordinary rise to prominence of human rights, but at the inception of the United Nations they were a secondary, albeit important, concern.⁴⁹ State sovereignty, sovereign equality, and the elimination of war as a tool of

(Feb. 13, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14224&LangID=E> (“Numerous cases show that government and pro-government forces as well as armed opposition groups are impeding humanitarian relief to populations facing extreme deprivation, including children, women, older persons, persons with disabilities, the chronically sick, and civilians and persons hors combat held in detention Apart from obstructing humanitarian access through sieges and tight check-points, attacks have been carried out to destroy harvests, kill livestock, and cut off water supplies, with the apparent aim of starving out the targeted populations, the experts noted.” (internal quotation marks omitted)).

45. U.N. Office for the Coordination of Humanitarian Affairs, Syria Crisis, <http://syria.unocha.org> (last visited Oct. 4, 2014).

46. U.N. High Comm’r for Refugees, Syria Regional Refugee Response, <http://data.unhcr.org/syrianrefugees/regional.php> (last updated Oct. 2, 2014).

47. Samantha Power, U.S. Permanent Representative to the U.N., Ambassador Power: In Syria We Are Witnessing the Worst Humanitarian Crisis in a Generation, Address Before the Security Council Stakeout on Syria (Feb. 13, 2014), *available at* <http://geneva.usmission.gov/2014/02/14/ambassador-power-in-syria-we-are-witnessing-the-worst-humanitarian-crisis-in-a-generation>.

48. KOFI A. ANNAN, “WE THE PEOPLES”: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 48 (2000) (emphasis added), *available at* http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf.

49. CHESTERMAN, *supra* note 14, at 52–53 (quoting Fernando R. Tesón).

foreign policy were much more prominent.⁵⁰ Since then, however, the plight of individual human beings faced with the implacable power of a state bent on doing them harm has slowly become a central preoccupation of the international community. Beginning immediately after the NATO bombing campaign in Kosovo, a number of independent panels and commissions concluded that military intervention to protect civilians from harm was a legitimate exercise of the use of force. The first was Independent International Commission on Kosovo chaired by Justice Richard Goldstone (“Goldstone Commission”). The final report of the Goldstone Commission was the first to coin the term “illegal but legitimate,” which has regained currency in the debate about military intervention in Syria.⁵¹ Among other things, the report suggested that the NATO bombing of Kosovo was justified because of the long history of oppression of Kosovar Albanians, and that the time had come to revise international law and the intuitional framework of the U.N. to permit future humanitarian intervention.⁵²

The second was the International Commission on Intervention and State Sovereignty (“ICISS”). In 2001 the ICISS—convened by Canada and including representatives of a wide range of governments—published its report on intervening for “human protection.”⁵³ The report attempted to offer a comprehensive take on the legal, moral, operational and political issues at stake, and to reflect the widest possible range of global perspectives.⁵⁴ The ICISS report identified an emerging moral and political principle that “intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to

50. *Id.*

51. THE INDEPENDENT INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 4 (2000), *available at* <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>.

52. *See id.* at 10 (“Experience from the NATO intervention in Kosovo suggests the need to close the gap between legality and legitimacy. The Commission believes that the time is now ripe for the presentation of a principled framework for humanitarian intervention which could be used to guide future responses . . . and which could be used to assess claims for humanitarian intervention.”).

53. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 2 (2001) [hereinafter ICISS], *available at* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

54. *Id.* at vii. Note that this commission was made up of members from Australia, Algeria, Canada, United States, Russia, Germany, South Africa, Philippines, Switzerland, Guatemala, and India. *Id.* at 77–79. The ICISS was established by the government of Canada. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, PAMPHLET, *available at* http://www.unitar.org/ny/sites/unitar.org.ny/files/69974_eng_175_lpi.pdf.

civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”⁵⁵ This principle is what the ICISS considered properly termed “R2P.”⁵⁶

The most important milestone in the development of the principles of R2P was the adoption by the United Nations General Assembly (“General Assembly”) of the 2005 World Summit Outcome. The 2005 World Summit was a meeting of representatives, including approximately 170 heads of state of the 191 (at the time) member states of the United Nations.⁵⁷ The issues considered at the summit included, among others, collective security arrangements.⁵⁸ The plenary concluded that both individual states and the international community as a whole bear the responsibility “to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁵⁹ The General Assembly adopted the World Summit outcome by consensus in October of 2005.⁶⁰ Six months later the Security Council adopted Resolution 1674 endorsing the World Summit version of R2P.⁶¹

Many other reports, documents, and statements issued before and since the World Summit confirm the consensus that civilians must not be left to the less-than-tender mercies of their brutal and oppressive governments.⁶² U.N. Secretary-General Kofi Annan and

55. ICISS, *supra* note 53, at 16.

56. *Id.* at 15 (“While there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organization practice as well as Security Council precedent suggest an emerging guiding principle—which in the Commission’s view could properly be termed ‘the responsibility to protect.’”).

57. *The 2005 World Summit*, UNITED NATIONS, http://www.un.org/en/events/pastevents/worldsummit_2005.shtml (last visited Nov. 11, 2014) (“The 2005 World Summit, held from 14 to 16 September at United Nations Headquarters in New York, brought together more than 170 Heads of State and Government. It was a once-in-a-generation opportunity to take bold decisions in the areas of development, security, human rights and reform of the United Nations.”).

58. *Id.*

59. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138 U.N. Doc. A/RES/60/1, (Sept. 16, 2005), *available at* <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>

60. *Id.*

61. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 26, 2006), *available at* http://www.un.org/docs/sc/unsc_resolutions06.htm (follow “S/RES/1674 (2006)” hyperlink) (“*Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”).

62. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Rep. of the High-level Panel on Threats, Challenges and Change*, ¶¶ 199–209, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* <http://www.un.org/Docs/journal/asp/ws.asp?m=A/59/565> (follow

his successor Ban Ki-moon have both publicly endorsed R2P.⁶³ Both the General Assembly⁶⁴ and the Secretary General⁶⁵ have continued to be actively engaged in developing R2P principles.

“English” hyperlink). The Secretary-General’s High Level Panel on Threats, Challenges and Change concluded that states could legitimately use force to protect civilians in other states, as a last resort, provided that the threat was sufficiently serious, the intervention narrowly tailored to address the threat, and the means proportional. *Id.* ¶ 201. Note that this panel was made up of present and former government officials and ministers. See ICISS, *supra* note 53, at 77 (listing the panel members).

63. In 2005, Annan urged a move toward R2P on the grounds that the United Nation’s stated principles and common interests “demand no less.” U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for all: Rep. of the Secretary-General*, ¶ 132, U.N. Doc. A/59/2005 (Mar. 21, 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement>. In 2008 Ban Ki-moon took pains to note that R2P is not a western or northern intervention imposed on the global south. Press Release, Secretary-General, Secretary General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event on ‘Responsible Sovereignty: International Cooperation for a Changed World,’ U.N. Press Release SG/SM/11701 (July 15, 2008), available at <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>; see also FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996). In 2009 Ki-moon further stated that all 192 member states share responsibility in furthering the principles relating to R2P. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 61, U.N. Doc. A/63/677 (Jan. 12, 2009) (“All Member States, not just the 15 members of the Security Council, should be acutely aware of both public expectations and shared responsibilities. If the General Assembly is to play a leading role in shaping a United Nations response, then all 192 Member States should share the responsibility to make it an effective instrument for advancing the principles relating to the responsibility to protect . . .”).

64. The General Assembly held a debate on R2P on the 23rd, 24th, and 28th of July 2009 in which only four countries, Venezuela, Cuba, Sudan, and Nicaragua, challenged R2P. *UN General Assembly Debate on Implementing the Responsibility to Protect, 2009*, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT (Oct. 18, 2012), <http://www.globalr2p.org/resources/343>. At the end of that debate the General Assembly decided to keep investigating R2P and has since held several informal dialogues. The Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); *General Assembly Interactive Dialogue on Early Warning, Assessment and the Responsibility to Protect*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT (Aug. 9, 2010), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2914-general-assembly-debate-on-early-warning-assessment-and-the-responsibility-to-protect>; *Informal Interactive Dialogue on the Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT (July 12, 2011), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/3566-general-assembly-interactive-dialogue-on-the-responsibility-to-protect>; *UN General Assembly Dialogue on the Responsibility to Protect: Timely and Decisive Response*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, [http://responsibilitytoprotect.org/Brief%20Summary\(3\).pdf](http://responsibilitytoprotect.org/Brief%20Summary(3).pdf) (last visited Oct. 10, 2014); *United Nations General Assembly Holds Fifth Informal, Interactive Dialogue on the Responsibility to Protect Focusing on the Theme of State Responsibility and Prevention*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs->

Under any of the principles espoused at any time in the decade-plus of the development of R2P, the plight of the Syrian people would justify intervention. To take the words of Secretary General Annan, the effects of the Syrian civil war “offend[s] every precept of our common humanity.”⁶⁶ The Assad regime in Syria has been at least as oppressive over at least as long a time as the Serbian regime in Kosovo.⁶⁷ “[M]ajor harm to civilians,” such as starvation, torture, death, and displacement on unimaginable scales, “is [both] occurring [and] imminently apprehended, and the state in question is . . . itself the perpetrator,” as envisioned by the ICISS.⁶⁸ The now-dominant language of the World Summit establishes a responsibility to protect populations from war crimes, among other things.⁶⁹ Systematic torture, targeting civilians, and siege warfare (denial of food, drink, medical care, and shelter) are all war crimes under international law.⁷⁰ So why all the sound and fury? Why is international military intervention controversial?

Because, as the remaining subsections below will show, military intervention remains illegal under international law without the authorization of the Security Council except in cases of self-defense. And yet, the anemic legal implementation of R2P belies the strength of the moral commitment that underpins the emerging consensus that states must not be permitted to rape, torture, and slaughter their citizens with impunity. That dissonance leads to the dilemma that this Article seeks to address: to follow the strong moral consensus on R2P at the cost of our moral commitment to the rule of law, or vice versa?⁷¹ The following subsections will unpack the legal prohibition

topics/5004-united-nations-general-assembly-holds-fifth-informal-interactive-dialogue-on-the-responsibility-to-protect.

65. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012), available at <http://undocs.org/A/66/874>; U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/65/877-S/2011/393 (June 28, 2011), available at <http://undocs.org/A/65/877>; U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/64/864 (July 14, 2010), available at <http://undocs.org/A/64/864>.

66. ANNAN, *supra* note 48, at 48.

67. Mimi Dwyer, *Think Bashar al-Assad Is Brutal? Meet His Family*, NEW REPUBLIC (Sept. 8, 2013), <http://www.newrepublic.com/article/114630/bashar-al-assad-syria-family-guide>.

68. See ICISS, *supra* note 53, at 16.

69. 2005 World Summit Outcome, *supra* note 59, ¶ 138.

70. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

71. That tension is not lost on concerned observers of the crisis in Syria, and many prominent voices have called for intervention notwithstanding its illegality. That cannot

on the use of force, taking into account ultimately unconvincing arguments offered by a number of commentators and officials that international law does, in fact, permit intervention.

B. Parsing the Prohibition

Notwithstanding minority views to the contrary,⁷² the Charter of the United Nations (“the Charter”) prohibits the unauthorized use of force, even to stop mass atrocities.⁷³ The Charter is generally recognized as a watershed in humanity’s political development and as the cornerstone of the international order established after World

be the solution, however, unless those same voices are content to participate in the erosion of the prohibition on the use of force and the rule of international law. See John Irish, *France Says Would Be Hard to Bypass U.N. In Action Against Syria*, REUTERS (Aug. 26, 2013), <http://www.reuters.com/article/2013/08/26/us-syria-crisis-france-idUSBRE97P04B20130826>; see also David Bosco, *Military Action in Syria as Reprisal*, FOREIGN POL’Y (Aug. 25, 2013), http://bosco.foreignpolicy.com/posts/2013/08/25/military_action_in_syria_as_reprisal#sthash.ktyyxqXf.fRUuB1h5.dpbs (“But in a broader sense, Western governments would be violating international law in order to defend it. More specifically, they would be skirting the rules on *when* you can use force in order to defend a key norm of *how* parties may fight: the ban on the use of chemical weapons.”); Michael Ignatieff, *How to Save the Syrians*, NEW YORK REVIEW OF BOOKS BLOG (Sept. 13, 2013), <http://www.nybooks.com/blogs/nyrblog/2013/sep/13/how-save-syrians> (“When legality and legitimacy part company, as they have done in Syria, those who say strict legality must prevail have an obligation to explain how this squares with morality, just as those say [sic] that morality should prevail need to explain why they are justified in breaking the law.”); Ian Hurd, Op-Ed., *Bomb Syria, Even If It Is Illegal*, N.Y. TIMES (Aug. 27, 2013), http://www.nytimes.com/2013/08/28/opinion/bomb-syria-even-if-it-is-illegal.html?_r=0 (advocating for “constructive noncompliance” which means recognizing that international law is changing rather than advocating intervention on the basis of “legitimate but illegal”); Rebecca Lowe, *Syria: Military Intervention Is Illegal—But May Be Legitimate*, INT’L BAR ASS’N (June 9, 2013), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=26cfd2b2-e6cf-4209-903c-9327c76c9bd4> (showing that Former French Minister of Foreign and European Affairs Bernard Kouchner believes that “legitimacy is often more important than legality” while Current French Foreign Minister Laurent Fabius believes that nations cannot completely disregard international law).

72. See ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1987); FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 24–25 (1988).

73. For a recent defense of this reading by Yale Law professors Oona Hathaway and Scott Shapiro, see Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn’t Optional*, N.Y. TIMES (Sept. 3, 2013), http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html?_r=0. See also JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th ed. 2013); Christine Gray, *The International Court of Justice and the Use of Force, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* (Christian J. Tams and James Sloan ed., 2013).

War II.⁷⁴ In Article 2, Paragraph 4, the Charter prohibits the use of force among states.⁷⁵ The Charter provides just two exceptions to this blanket prohibition. One is the right to self-defense, articulated in Article 51.⁷⁶ The second is when the use of force is authorized by the Security Council using what are commonly referred to as “Chapter VII powers,” granted to it under Article 39⁷⁷ and Article 42.⁷⁸ As a preliminary matter, the legality of any proposed military action by the United States against Syria (or any future unauthorized military intervention) should first be tested against the language of the Charter.⁷⁹

The prohibition on the use of force has reached the level of customary international law.⁸⁰ That view has been consistently upheld by the International Court of Justice (“ICJ”).⁸¹ In *Corfu Channel*,⁸² *Military and Paramilitary Activities in and Against Nicaragua*,⁸³ *Armed*

74. RAMESH THAKUR, *NEW MILLENNIUM, NEW PERSPECTIVES: THE UNITED NATIONS, SECURITY, AND GOVERNANCE* 1–2 (2000).

75. U.N. Charter art. 2 para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

76. *Id.* at art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

77. *Id.* at art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

78. *Id.* at art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

79. This interpretation of the language of the Charter is not uncontested. Differing interpretations will be addressed below. *See infra* notes 97–110 and accompanying text.

80. *See* Gray, *supra* note 73.

81. ICJ opinions, however, do not establish precedent and are only authoritative and binding with respect to the specific dispute between the parties to a case. *See infra* notes 101–111 and accompanying text.

82. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9).

83. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 100, 118–19 (June 27).

Activities on the Territory of the Congo,⁸⁴ *Legality of the Use of Force*,⁸⁵ and, to a lesser extent, the advisory opinions *Threat or Use of Nuclear Weapons*⁸⁶ and *Construction of a Wall in the Occupied Palestinian Territory*,⁸⁷ the ICJ has established that the Article 2(4) prohibition is broad, does not admit exceptions other than those listed in the Charter, and is a rule of customary international law.⁸⁸ The General Assembly has also weighed in, with several resolutions intended to clarify and reinforce the Charter's ban on the use of force.⁸⁹ Many commentators even argue that it is a *jus cogens* norm.⁹⁰

The Charter does not provide a legal justification for military intervention in Syria—or anywhere else—unless in self-defense or with authorization from the Security Council.⁹¹ Some commentators,

84. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 223–24 (Dec. 19).

85. *Legality of Use of Force (Yugo. v. Belg.)*, 1999 I.C.J. 124 (June 2); *Legality of Use of Force (Yugo. v. Can.)*, 1999 I.C.J. 259 (June 2); *Legality of Use of Force (Yugo. v. Fr.)*, 1999 I.C.J. 363 (June 2); *Legality of Use of Force (Yugo. v. Ger.)*, 1999 I.C.J. 422 (June 2); *Legality of Use of Force (Yugo. v. It.)*, 1999 I.C.J. 481 (June 2); *Legality of Use of Force (Yugo. v. Neth.)*, 1999 I.C.J. 542 (June 2); *Legality of Use of Force (Yugo. v. Port.)*, 1999 I.C.J. 656 (June 2); *Legality of Use of Force (Yugo. v. Spain)*, 1999 I.C.J. 761 (June 2); *Legality of Use of Force (Yugo. v. U.K.)*, 1999 I.C.J. 826 (June 2).

86. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 266 (July 8).

87. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, 171 (July 9).

88. *See infra* Part II.C.

89. *See* G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018, at 122–23 (Oct. 24, 1970); *see also* G.A. Res. 66/253, U.N. GAOR, 66th Sess., Supp. No. 53, U.N. Doc. A/RES/66/253, at 1 (Feb. 21, 2012).

90. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 146 (2d ed. 2006); LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR* 9 (2010); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 3 (1999); Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT'L L.J. 245, 253–54 (2004). *But see* James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT'L L. 215 (2011). It is worth noting in the present context that the U.S. government itself referred to the prohibition as a *jus cogens* norm in its submission to the ICJ in the *Nicaragua* case. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). This Article need not take a position on the issue, since the same argument applies whether the norm is conventional, customary, or *jus cogens*.

91. *See* John D. Becker, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force*, 32 DENV. J. INT'L L. & POL'Y 583, 591 (2004); Sarah Mazzochi, *Humanitarian Intervention in A Post-Iraq, Post-Darfur World: Is There Now A Duty to Prevent Genocide Even Without Security Council Approval?*, 17 ANN. SURV. INT'L & COMP. L. 111, 123–24 (2011); Paul Campos, *Striking Syria Is Completely Illegal*, TIME (Sept. 5, 2013), <http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal/>; Hathaway & Shapiro, *supra* note 73; Kevin Jon Heller, *Four Thoughts on Koh's Defense of Unilateral Humanitarian Intervention*, OPINIO JURIS (Oct. 2, 2013),

however, disagree with the standard reading and instead propose either that Article 2(4), on its face, would permit the United States to attack Syria, or that subsequent developments in customary international law have created new legal exceptions to the rule.⁹² Supporters seeking to ground military intervention in international law must therefore offer an affirmative case. Some standard arguments in that vein will be examined in the following paragraphs.

Arguments that Article 2(4), on its face, in fact permits unauthorized military interventions differ slightly from one another, but all flow from a misreading of the text, a disregard of drafting history of the provision, and an inequitable weighting of subsequent state practice.

The argument that the language of 2(4) permits some uses of force rests on two key ambiguities in the text. First, is the operation of “against the territorial integrity or political independence.”⁹³ Second, is the phrase “or in any other manner inconsistent with the Purposes of the United Nations.”⁹⁴ In Article 2(4) the ‘active’ phrase “Members shall refrain in their international relations from the threat or use of force” is immediately followed by “against the territorial integrity or political independence of any state.”⁹⁵ But 2(4) does not

<http://opiniojuris.org/2013/10/02/four-thoughts-kohs-defense-unilateral-humanitarian-intervention/>; David Kaye, *Harold Koh’s Case for Humanitarian Intervention*, JUST SEC. (Oct. 7, 2013), <http://justsecurity.org/2013/10/07/kaye-kohs-case/>; Carsten Stahn, *Guest Post: On ‘Humanitarian Intervention’, ‘Lawmaking’ Moments and What the ‘Law Ought to Be’—Counseling Caution Against a New ‘Affirmative Defense to Art. 2 (4)’ After Syria*, OPINIO JURIS (Oct. 8, 2013), <http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-lawmaking-moments-law-counseling-caution-new-affirmative-de/>.

92. Most recently, Professor Koh advanced one such reading. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SEC. (Oct. 2, 2013), <http://justsecurity.org/1506/koh-syria-part2/>; see also TESÓN, *supra* note 72; Jordan Paust, *US Use of Limited Force in Syria Can be Lawful Under the UN Charter*, JURIST (Sept. 10, 2013), <http://jurist.org/forum/2013/09/jordan-paust-force-syria.php>; Jennifer Trahan, *Syria Insta-Symposium: Jennifer Trahan—The Legality of a U.S. Strike on Syria*, OPINIO JURIS (Aug. 31, 2013), <http://opiniojuris.org/2013/08/31/syria-insta-symposium-jennifer-trahan-legality-u-s-strike-syria/>. Tesón, at least, has acknowledged that his view is not widely shared. See Fernando Tesón, *Syria and the Doctrine of Humanitarian Intervention*, BLEEDING HEART LIBERTARIANS (Sept. 2, 2013), <http://bleedingheartlibertarians.com/2013/09/syria-and-the-doctrine-of-humanitarian-intervention/> (“Most international lawyers require United Nations Security Council authorization as a condition for the lawfulness of action (*not* Congressional authorization, which is irrelevant to international law.) I disagree, but mine is concededly a minority view among international law scholars.”).

93. U.N. Charter art. 2 para. 4.

94. *Id.* The following discussion is adapted from the thorough treatment of this strain of scholarship provided by Simon Chesterman. See CHESTERMAN, *supra* note 14.

95. U.N. Charter art. 2 para. 4.

specify whether or how the latter modifies the former.⁹⁶ Is it a non-exclusive list of types of force that, among all other types, are prohibited? Or is it a restriction of the scope of the prohibition, limiting it only to the use of force against either territorial integrity or political independence? Both options require reading additional words into the text. The former would read something like “All Members shall refrain from the threat or use of force . . . *including, but not restricted to, the use of force* against the territorial integrity or political independence of any state” (“Option A”). The latter would be something to the effect that “All Members shall refrain from the threat or use of force . . . *where such force is used* against the territorial integrity or political independence of any state” (“Option B”). Option B might permit humanitarian intervention as long as the intention of the intervener is not to alter the boundary or change the regime of the state it is attacking.⁹⁷

The second ambiguity, the effect of “or in any other manner . . .,” is interpreted by proponents of a permissive standard as both reinforcing the choice of Option B over Option A and providing a criterion for uses of force endorsed by the Charter without authorization and outside the enumerated exceptions of Article 51 and Chapter VII. In the former regard “or” completes the exclusive series—as in, “shall not do X, Y, or Z” such that X, Y, and Z constitute the entire universe of things prohibited.⁹⁸ In the latter regard, the “other” in “in any other manner inconsistent with the purposes of the United Nations” would characterize the entire list—and therefore the entire Article—as prohibiting only inconsistent uses of force and

96. *Id.*

97. *See generally* TESÓN, *supra* note 72. Under this reading, a state could send tanks and infantry across a border and—as long as the invading state did not intend to change the boundary—that would not constitute a violation of the invaded state’s territorial integrity. Or a state could shoot down the fighter planes of another state’s military—fighter planes presumably carrying out the wishes of that state’s commander in chief—without infringing on that state’s political independence. *But see* Oscar Schachter, Editorial Comments, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645, 649 (1984) (“The idea that wars waged in a good cause such as democracy and human rights would not involve a violation of territorial integrity or political independence demands an Orwellian construction of those terms. It is no wonder that the argument has not found any significant support.”).

98. Paust, *supra* note 92 (“First, not every use of armed force is prohibited in the text of Article 2(4) of the Charter, which expressly covers only three types of force: (1) that used ‘against’ the ‘territorial integrity’ of a ‘state,’ (2) that used ‘against’ the ‘political independence’ of a ‘state,’ and (3) that which is ‘in any other manner inconsistent with the purposes of the United Nations.’”); *see also* Jordan J. Paust, *Relative Sovereignty and Permissible Use of Armed Force*, 20 MICH. ST. U. COLL. L. INT’L L. REV. 1, 4 (2011); Jordan Paust, *Remembering Tom Franck*, 104 AM. SOC’Y INT’L L. PROC. 409, 410 (2010).

therefore, by implication, permitting consistent uses such as the protection of the human rights of endangered civilians.⁹⁹

While readings of “other” in this vein are frequently offered alone, they are in fact dependent on choosing Option B over Option A. If territorial integrity and political independence are understood in the first place to be examples in a non-exhaustive list (Option A), then it becomes very difficult to read “other inconsistent purposes” as anything other than a third item in that (still) non-exhaustive list. It is only choosing to characterize the list as exhaustive that opens the question of what *is* permitted and thereby makes it possible to suggest that states may use force in ways that are consistent with the purposes of the Charter.

None of the foregoing readings survive close examination. Certainly the text of 2(4) is ambiguous, and if that were the end of the analysis then the international community would be left with competing plausible interpretations and no way outside of authoritative determination—as by a court—to decide between them. Fortunately, international law provides guidance on dispelling that ambiguity. The Vienna Convention on the Law of Treaties provides that, where the definitive meaning cannot be gleaned from the text, recourse may be had to the drafting history and subsequent practice.¹⁰⁰ Furthermore, Article 38 of the Statute of the International Court of Justice, which is commonly understood to be an authoritative statement of the sources of international law, provides that judicial decisions are a subsidiary means of determining the law.¹⁰¹ Both the drafting history of Article 2(4) and the judicial decisions of the ICJ on the use of force point unequivocally to Option A, the reading of 2(4) as an expansive prohibition of all uses of force save acts a) in self-defense; or, b) authorized by the Security

99. See Koh, *supra* note 92 (suggesting that “under certain highly constrained circumstances a nation could lawfully use or threaten force for genuinely humanitarian purposes”); TESÓN, LAW AND MORALITY, *supra* note 72.

100. Vienna Convention on the Law of Treaties art. 31, ¶ 3, May 23, 1969, 1155 U.N.T.S. 331 (“There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.”).

101. See Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 [hereinafter ICJ Statute] (“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”).

Council.¹⁰² The following paragraphs will discuss the drafting history of Article 2(4), and its interpretation in several judgments of the ICJ. The subsequent practice of states will be addressed in subsection II.C since it overlaps significantly with the question of whether a new rule of customary international law has come into existence following the adoption of the Charter.

The text originally proposed at Dumbarton Oaks in 1945 did not contain the problematic phrases.¹⁰³ To the contrary, it simply read, “All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization.”¹⁰⁴ The addition of the “territorial integrity or political independence” language was the result of an Australian amendment intended to give peace of mind to smaller states by emphasizing the protection of their territorial boundaries and political independence.¹⁰⁵ These smaller states were seeking to further emphasize the limitations on the power of larger states to use force. The language was therefore intended to emphasize rather than to limit the broad prohibition. For instance, the Norwegian delegation—which was in favor of omitting the reference—noted that “it should be made very clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force . . . going beyond individual or collective self-defense.”¹⁰⁶ The U.S. delegation stated “that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to insure that there should be no loopholes.”¹⁰⁷ Accordingly, one must either completely ignore or reinterpret the

102. As Secretary of State Kerry himself affirmed at his confirmation hearing when he said, “I think a U.N. resolution is a necessary ingredient to provide the legal basis for military action in an emergency.” *Hearing on the Nomination of Massachusetts Democratic Sen. John Kerry to Be Secretary of State: Hearing Before the S. Foreign Relations Comm.*, 113th Cong. (2013), available at <http://www.lawfareblog.com/wp-content/uploads/2013/01/Kerry-Confirmation-Testimony.pdf>.

103. CHESTERMAN, *supra* note 14, at 49.

104. Washington Conversations on International Peace and Security Organization, Washington, D.C., *Proposals for the Establishment of a General International Organization* (Oct. 7, 1944), available at <http://www.ibiblio.org/pha/policy/1944/441007a.html>.

105. United Nations Conference on International Organization, San Francisco, *Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia*, 3 Doc. U.N. Conf. on Int'l Org. 543 (May 5, 1945); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 267 (1963).

106. United Nations Conference on International Organization, San Francisco, *Summary Report of Eleventh Meeting of Committee I/1*, 6 Doc. U.N. Conf. on Int'l Org. 334–35 (June 5, 1945).

107. *Id.* at 335.

drafting history of the Charter to arrive at a reading under which only three restricted types of force are prohibited.

The prohibition on the use of force by states has been the subject of several opinions issued by the ICJ, each of which emphasized the broad nature of the norm.¹⁰⁸ In the present context the opinion in the *Corfu Channel* case is particularly relevant. There, the Court noted that the prohibition on the use of force was not subject to amendment by the later devised interventionist theories of states.¹⁰⁹ In a passage that has been often quoted by both scholars and the Court itself, the majority noted that

[t]he Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less inadmissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.¹¹⁰

One aspect of the reasoning stands out here. The Court squarely engaged the question of what happens when international institutional arrangements fail to serve their intended purpose. Today observers would point to the paralysis of the Security Council even in the face of horrific, large-scale violations of rights as just such a defect. The Court, however, was concerned that the outcome of allowing states the freedom to intervene in the face of organizational

108. It should be noted that there is no *stare decisis* in international law and that, formally, decisions of the ICJ are only binding with respect to the parties. They do not provide precedent or establish authoritative determinations of international law. Decisions of Courts, including the ICJ, are, according to the ICJ's own statute, a *subsidiary* means of establishing international law. In practice, however, decisions of the ICJ are given considerable weight by tribunals the world over, and by the ICJ itself in future matters. See generally Nathan Miller, *An International Jurisprudence? The Operation of "Precedent" Across International Tribunals*, 15 LEIDEN J. INT'L L. 483 (2002); Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17 U.C. DAVIS J. INT'L L. & POL'Y 233 (2011).

109. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 34–35 (Apr. 9). In so doing, the Court expressly rejected the position of the United Kingdom (still advanced by some scholars) that force that fell short of threatening the territorial integrity or political independence of the target state did not run afoul of the Article 2(4) prohibition. See generally Christopher Greenwood, *The International Court of Justice and the Use of Force, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* 373 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

110. *Corfu Channel*, 1949 I.C.J. at 35.

deadlock would be a return to the “policy of force” that characterized the pre-United Nations era.

The ICJ quoted the language from *Corfu Channel* in its *Nicaragua* decision. There, far from limiting the prohibition on the use of force, the Court arguably amplified it by determining that even providing arms to groups using force against a sovereign constituted the use of force against that state—even if the armed forces of the supplying state never fired a single shot.¹¹¹ Some of the Court’s reasoning in the *Nicaragua* case is especially relevant to the question of whether subsequent developments in customary international law have superseded the broad prohibition in the Charter. These will be discussed in greater detail below.¹¹²

Some would argue that state practice has shifted considerably since the end of the Cold War, weakening the relevance of Cold War-era decisions. Yet in *Democratic Republic of Congo v. Uganda*, which was filed in 2008, the Court had ample opportunity to consider contemporary state practice and its potential impact on the nature of customary law regarding the use of force. The Court in that case again emphasized the customary nature of the prohibition on the use of force and again put forward its reading of Article 2(4) as an expansive prohibition.¹¹³

The International Court of Justice in the *Nicaragua* case did, however, leave open the possibility that future developments in customary international law could supersede the prohibition on the use of force found in the Charter. The Court noted that:

The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.¹¹⁴

111. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 15 (June 27).

112. *See infra* Part II.C.

113. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 148 (Dec. 19) (noting that “[t]he prohibition against the use of force is a cornerstone of the United Nations Charter,” and that the Charter does not allow use of force outside the strict confines of art. 51 in self-defense).

114. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at ¶ 207. The Court went on to note that no such shared principle was evident:

In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its

One could argue, based on that language, that the behavior of powerful states could be sufficient to satisfy the first criterion (a general practice) for a new rule of customary international law. However, the Court noted that acts of intervention would not be the only behavior relevant to the analysis.¹¹⁵ Also important would be the reaction of states to such military interventions. Would they be accepted? Or condemned? The following section will show that states have developed no new general practice or *opinio juris*. Customary international law on the use of force remains unmodified, and the Charter's prohibition unaltered.

C. Countervailing Custom?

A customary international legal rule permitting unauthorized intervention could, based on the later-in-time principle, modify the Charter prohibition, but no such rule has come into being. The practice of the small minority of states that have engaged in unauthorized military intervention cannot be sufficient to establish the general practice required for the emergence of a new rule of customary international law. Even if it could, the total absence of an express belief among those states that their interventions were in fact permitted under international law significantly undermines any claim to the emergence of a new rule superseding the Charter prohibition on the use of force. In contrast, the vast majority of states in the world have clearly and consistently articulated their opinion that military intervention absent Security Council authorization remains illegal under international law.

The inconsistent, at best, *opinio juris* (see below) of interventionist states must be understood in the context of the strong, clear, and often-expressed opinion of the majority of states that such conduct remains entirely prohibited by international law. In 1970, the General Assembly passed a resolution which has come to be

prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

Id.

115. *Id.* ("Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'" (quoting *North Sea Continental Shelf Cases*, 1969 I.C.J. 44, ¶ 77 (Feb. 20))).

known as *Friendly Relations*. That resolution, passed unanimously, declares:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.¹¹⁶

Another important General Assembly resolution is the *Definition of Aggression*. Adopted in 1974, the resolution endorses a definition of aggression which specifies that “[t]he invasion or attack by the armed forces of a State of the territory of another State . . . however temporary” shall be considered an act of war.¹¹⁷ It further provides that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”¹¹⁸

More recently, in the aftermath of the NATO operation in Kosovo, more than 130 states (approximately two thirds of all states in the world) issued a declaration specifically denouncing the legality of humanitarian intervention absent Security Council authorization:

We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called “right” of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law. . . . Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.¹¹⁹

116. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 123 (Oct. 24, 1970) [hereinafter *The Resolution*].

117. Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9890, at 143 (Dec. 14, 1974).

118. *Id.*

119. Group of 77 South Summit, *Declaration of the South Summit*, GROUP OF 77 (Apr. 10–14, 2000), http://www.g77.org/summit/Declaration_G77Summit.htm; see also Heller, *supra* note 91 (discussing the *Declaration of the South Summit*).

Yet many scholars contend that, since the adoption of the Charter, a new rule of customary international law has come into being. This new rule of customary international law supersedes the prohibition on the use of force found in the Charter and permits military interventionism.¹²⁰ It is well settled under international law that proving the existence of a rule of customary international law requires showing a general practice of states and a belief by the states that the practice is required by law (*opinio juris*).¹²¹ Both elements must be satisfied; the absence of either a general practice or of a belief that the general practice is required by law would seriously hinder any effort to establish the existence of a new rule of customary international law.¹²²

The Vienna Convention provides that textual ambiguities may be cured with reference to subsequent practice as well as to the drafting history of the treaty in question. An examination of the subsequent practice related to Article 2(4) will therefore serve both to cement the broad reading of the prohibition on the use of force and to establish that the text of the Charter has not been supplanted by subsequent developments in customary international law.

The contention that a general practice has emerged since the adoption of the charter relies on the interventionist track record of a small handful of states. To paraphrase the famous aphorism of the late Louis Henkin, most states mostly adhere to the prohibition on the use of force most of the time.¹²³ The vast majority of unauthorized military interventions undertaken since the establishment of the United Nations were conducted by the United States and a handful of Western European states. Altogether, these interventionist states account for, at most, ten percent of the states in the world. To argue that the behavior of those states gives rise to the “general practice” required for the establishment of a new rule of customary international law is to argue that the behavior of the most

120. See MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 2* (2001); see generally Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1974).

121. ICJ Statute, *supra* note 101, 59 Stat. at 1060 (stating that the Court shall apply “international custom, as evidence of a general practice accepted as law”); see also JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 23–30 (7th ed. 2008).

122. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (8th ed. 2013).

123. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (“It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”).

powerful states in the world counts for more, much more, in the development of customary international law than the behavior of the entire rest of the world.¹²⁴ Such an argument violates the principle of sovereign equality and comes perilously close to substituting power for the rule of law.

Even if one were to accept a theory of customary international law under which the behavior of a small, but powerful, minority of states was sufficient to establish a general practice, it would be almost impossible to argue for the existence of *opinio juris* when even interventionist states go out of their way to avoid declaring that their interventions are in accordance with a new rule of international law. The NATO operation in Kosovo is frequently cited by proponents of an international law permitting intervention.¹²⁵ However, the position of the United States was made clear by Acting Senior Legal Adviser to the U.S. State Department Michael Matheson. Speaking on a panel at the meetings of the American Society of International Law in 1999, Matheson said:

[M]any NATO states—including the United States—had not accepted the doctrine of humanitarian intervention as an independent legal basis for military action that was not justified by self-defense or the authorization of the Security Council.

124. Several scholars do advance such an understanding of the development of customary international law, one that explicitly privileges the practice of a small group of elite states. See, e.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 146 (2005) ("*Opinio juris* refers to the beliefs of states that interact with a potential violator. To the extent that these states believe there exists a legal obligation, the potential violator faces a rule of [Customary International Law]."); Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 108 (2001) ("[T]he customary international rule is the one which is considered to be such by the will of those states which are able to impose their point of view." (emphasis omitted)).

125. See, e.g., Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT'L L. 745, 799 (2013) ("Although contingent sovereignty does not expressly authorize unilateral intervention to oust a sitting government, the foundation is in place to justify such an action, not unlike the NATO intervention in Kosovo in 1999."); Ashley Deeks, *Syria, Chemical Weapons, and Possible U.S. Military Action*, LAWFARE (Dec. 10, 2012), <http://www.lawfareblog.com/2012/12/syria-chemical-weapons-and-possible-u-s-military-action/#.UvpqW3k3-d8>; Frances Gibb, *Analysis: Kosovo a Legal Precedent for Strike on Syria*, THE TIMES (Aug. 27, 2013), <http://www.thetimes.co.uk/tto/law/article3853582.ece>; Enver Hoxhaj, *It's 1999 in Syria*, FOREIGN POLICY (Aug. 23, 2013), http://www.foreignpolicy.com/articles/2013/08/23/it_s_1999_in_syria_kosovo_foreign_minister_intervention; Mark Landler & Michael R. Gordon, *Air War in Kosovo Seen as Precedent in Possible Response to Syria Chemical Attack*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/world/air-war-in-kosovo-seen-as-precedent-in-possible-response-to-syria-chemical-attack.html?pagewanted=all>.

.....
 This was a pragmatic justification designed to provide a basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the Alliance if misused by others.¹²⁶

Furthermore, of the states participating in the military campaign only two have ever clearly stated their position that the intervention was permitted under international law. The bombing of Kosovo gave rise to proceedings in the ICJ. Only Belgium and the United Kingdom argued that their actions were in conformity with international law.¹²⁷ The rest, including the United States, declined to do so. Of all the states in the world, only the United Kingdom has clearly and openly articulated its view that international law permits military intervention without Security Council authorization under certain circumstances.¹²⁸

Furthermore, interventionist states have harshly condemned the same conduct when undertaken by others. In the conflict between Russia and Georgia in 2008, for instance, Russia claimed to be acting to protect the non-Georgian (Russian) minorities in South Ossetia

126. Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000).

127. CHESTERMAN, *supra* note 14, at 46 ("In the joint hearings on the ten requests for provisional measures, only Belgium presented a clear argument that its actions were justified on the basis of a right of humanitarian intervention.")

128. The Prime Minister's Office of the United Kingdom published the following legal opinion that sets out the U.K. Government's position regarding the legality of military action in Syria:

If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

U.K. GOV'T, CHEMICAL WEAPON USE BY SYRIAN REGIME: U.K. GOVERNMENT LEGAL POSITION (Aug. 29, 2013), *available at* <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

and Abkhazia from ethnic cleansing being undertaken by the Georgian government.¹²⁹ Georgia took the first shots. The Georgian government had a long history of violent, racist rhetoric against non-Georgian minorities, and the actual effect of the conflict was that nearly half the minority population fled to Russia. Russia even went to the Security Council, where it claimed that it had taken military action in part to protect civilians, claims that were met with skepticism.¹³⁰

Many governments rejected Russia's claims to legality.¹³¹ The United States in particular was outraged, and strenuously defended the sovereignty and territorial integrity of Georgia.¹³² It may very well be that Russia acted in bad faith and that its claims to a humanitarian justification for its military conduct were a smokescreen. This Article does not take a position on that question, nor does it need to. The relevance in the present context is that the condemnations issued by the United States and other interventionist governments were not framed as disagreements over whether the particular criteria that characterize a customary international rule favoring intervention were or were not met—as might have been expected if those countries believed that such a law existed. Rather, the objections were couched in the stark language of the Charter, the prohibition on the use of force, and the fundamental principle of sovereign equality.

It should be clear from the discussion above that states undertaking unauthorized military intervention have done so with an almost deliberate lack of accompanying *opinio juris*. Hence it seems difficult to argue that there has been any modification of the broad customary international legal prohibition on the use of force that has been noted and upheld time and again by the ICJ. The question then

129. Nicolai N. Petro, *The Legal Case for Russian Intervention in Georgia*, 32 *FORDHAM INT'L L.J.* 1524, 1545 (2009).

130. See Press Release, Security Council, Security Council Holds Third Emergency Meeting as South Ossetia Conflict Intensifies, Expands to Other Parts of Georgia, U.N. Press Release SC/9419 (Aug. 10, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9419.doc.htm/> (“The Russian Federation wondered whether the term ‘ethnic cleansing’ could be used to describe Georgia’s actions. How many civilians had to die before it was described as genocide?”).

131. Hathaway & Shapiro, *supra* note 73.

132. See *Remarks With French President Nicolas Sarkozy on the Situation in Georgia*, DEP’T ST. ARCHIVE (Aug. 14, 2008), <http://2001-2009.state.gov/secretary/rm/2008/08/108254.htm>. As Secretary of State Condoleezza Rice stated, “Too many innocent people have died and Georgia, whose territorial integrity and independence and sovereignty we fully respect, must be able to get back to normal life,” reasserting, “that the United States of America stands strongly, and the President of France has just said, for the territorial integrity of Georgia. This is a member-state of the United Nations whose internationally recognized boundaries have to be respected.” *Id.*

arises whether, in the absence a new rule of customary international law, some other basis in international law might be found. The Obama administration has suggested that the Assad regime's use of chemical weapons might provide such a basis.

D. Resurrecting Reprisals

On September 10, 2013, President Barack Obama firmly distanced himself from the few fragile threads his administration might have used to fashion a justification under international law for military intervention in Syria by advancing a legal theory apparently based on the antiquated doctrine of reprisals. In his speech to the American people that night, President Obama narrowly and specifically advanced the use of chemical weapons by the Assad regime as the reason for intervention, noting, "On that terrible night, the world saw in gruesome detail the terrible nature of chemical weapons, and why the overwhelming majority of humanity has declared them off-limits—a crime against humanity, and a violation of the laws of war."¹³³ He argued:

[I]t is in the national security interests of the United States to respond to the Assad regime's use of chemical weapons through a targeted military strike. The purpose of this strike would be to deter Assad from using chemical weapons, to degrade his regime's ability to use them, and to make clear to the world that we will not tolerate their use.¹³⁴

By basing both the justification for intervention and its goals in terms of chemical weapons, President Obama moved away from a theory of

133. Press Release, Office of the Press Secretary, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

134. *Id.* The portion of his speech quoted above could be read as an entirely political (or military) justification of intervention—one that ignored international law altogether. However, in the past President Obama explicitly acknowledged that his decisions would be driven, at least in part, by international law. And he relied heavily on the illegality of chemical weapons under international law in other parts of his speech:

Because these weapons can kill on a mass scale, with no distinction between soldier and infant, the civilized world has spent a century working to ban them. And in 1997, the United States Senate overwhelmingly approved an international agreement prohibiting the use of chemical weapons, now joined by 189 governments that represent 98 percent of humanity.

Id.

humanitarian intervention. Instead, it seemed that he was attempting to resurrect the doctrine of reprisals.¹³⁵

Under pre-Charter international law, one way in which states could lawfully use force against one another was to exercise their right of armed reprisal in response to a violation of international law:

Reprisals in particular are a traditional act of self-help under international law, consisting of a breach of international law in response to a prior violation by another state and undertaken for the purpose of enforcing compliance. They are “unlawful acts that become lawful in that they constitute a reaction to a delinquency by another State.”¹³⁶

The enforcement aspect of that definition lends further support to the contention that President Obama was advancing a theory based on the doctrine of reprisals. Armed reprisals were understood to be a form of law enforcement, a way for a state to exercise self-help in response to a violation of its rights.¹³⁷ As the *Institut de droit international* put it in 1934: “Reprisals are measures of coercion, derogating from the ordinary rules of international law, decided and taken by a State, in response to wrongful acts committed against it, by

135. Shane Darcy, *Retaliation and Reprisal*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., forthcoming 2015). Nor is President Obama alone in that regard. Justice Goldstone believes:

In the present case, it could be argued that the military force is being used to protect the people of Syria from the future use of chemical weapons. That would very much depend on the efficacy of the force used and whether it would indeed deter such future use of such weapons.

. . . If the intervention is calculated to prevent the future use of chemical weapons by the Syrian Government and any future regimes that might consider it, I would support such an intervention.

Lowe, *supra* note 71.

136. Darcy, *supra* note 135 (manuscript at 1) (quoting ANTONIO CASSESE, INTERNATIONAL LAW 299 (Oxford Univ. Press, 2d ed. 2005)).

137. *Id.* This Article takes the position that armed reprisals have been outlawed by the Charter. See *infra* notes 142–148 and accompanying text. Hence a detailed discussion of the nuances of that doctrine is beyond the scope of the present project. It is worth noting, however, that for a state to acquire a right of armed reprisal the target state must first have a) violated international law and, b) in so doing, injured the interests of the state undertaking the reprisal. “Reprisals are acts which, although normally illegal, are exceptionally permitted as reaction of one state against a violation of its right by another state.” HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 23 (7th ed. 2007). The question of which rights of the U.S. Syria might have violated and the extent of the armed reprisals authorized by that violation would require quite a bit of unpacking. One possible answer would be legal obligations *erga omnes* (owed to the entire international community) created by the ban on chemical weapons. See ANDRÉ DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES (1996).

another State, and intended to impose on it, by pressure exerted through injury, the return to legality.”¹³⁸

President Obama’s remarks did seem to emphasize the “law enforcement” aspect of the intended intervention; he noted that military action would specifically target the Assad regime’s ability to use chemical weapons and deter future use.¹³⁹

To be sure, the production, stockpiling, and use of chemical weapons are illegal.¹⁴⁰ This is true both under the Chemical Weapons Convention to which Syria was not, at the time, a party and under customary international law.¹⁴¹ Syria is bound by the latter, customary international law, even if it has not ratified the former. It therefore seems clear that Syria has violated its international legal obligations several times over—in the production, the storage, and, finally, the use of prohibited weapons.

But even with that being the case, international law simply has no provision that allows for the use of force by one state, or even a group of states, against another that has violated international law. That was not always true. Before the Charter and the advent of the modern era of international law, states commonly used force against one another as a way to vindicate their rights under international law.¹⁴² The Charter, however, represented a paradigm shift away from force and punishment as the dominant modes of international relations and towards a system defined by diplomacy and the peaceful settlement of international disputes.¹⁴³ To argue that the Charter permits armed reprisals is to argue in favor of Option B described above, or the position that the Charter sets out only a weak and limited prohibition

138. Darcy, *supra* note 135 (manuscript at 4) (quoting *Institut de Droit International*, Session de Paris 1934, *Régime de représailles en temps de paix*, Article 1).

139. Press Release, Office of the Press Secretary, *supra* note 133.

140. *Timeline of Syrian Chemical Weapons Activity, 2012–2014*, ARMS CONTROL ASS’N (Aug. 19, 2014), <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity>. On September 12, 2013, Syria:

[S]ent a letter to the United Nations Secretary General which said that Assad signed a legislative decree providing the accession of Syria to the Chemical Weapons Convention. In the letter, Assad said Syria would observe its CWC obligations immediately, as opposed to 30 days from the date of accession, as stipulated in the treaty.

Id.

141. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol].

142. Blum, *supra* note 12, at 58.

143. *Id.* at 73. Professor Blum documents the move from narratives of punishment to ones of regulation and cooperation, then goes on to argue that the shift obscured the persistence of the same forms of interstate relations.

of the use of certain kinds of force.¹⁴⁴ However, for the many reasons outlined above, that reading is unsustainable. Furthermore, the subsequent practice with regard to reprisals is very similar to the practice with regard to the general use of force. Scholars,¹⁴⁵ the ICJ,¹⁴⁶ the General Assembly,¹⁴⁷ and the International Law Commission¹⁴⁸ have all indicated that armed reprisals have no basis in contemporary international law. And there are even fewer examples of state practice characterized as reprisals than there are of attacks with other claimed justifications.¹⁴⁹

The preceding Sections show the dilemma posed by the professed commitment of the international community to use force in situations, like the Syrian civil war, where states torture and kill massive numbers of their own citizens, and the persistent illegality of such uses of force. One way around that dilemma is to define it away.

E. More of a Guideline, Really

The argument offered in this Article assumes that states prefer to act according to international law; that law, even international law, constrains behavior (in this case of states); that international law has entered a “post-ontological era” where its existence as “real” law need no longer be defended;¹⁵⁰ that states and the international legal system derive reciprocal legitimacy from behavior by states in conformity with the law.¹⁵¹ Furthermore, this Article aligns itself with the strain of thinking that the United States harms its standing in the world and its ability to achieve its medium- and long-term interests

144. *Supra* Part II.A.

145. JAMES L. BRIERLY, *THE LAW OF NATIONS* 415 (Humphrey Waldock ed., 6th ed. 1963); CRAWFORD, *supra* note 121, at 466; GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, in 2 *THE LAW OF ARMED CONFLICT* 58 (1968); Antonio Cassese, *Return to Westphalia? Considerations on the Gradual Erosion of the Charter System*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 505, 514 (Antonio Cassese ed. 1986); Darcy, *supra* note 135.

146. Darcy, *supra* note 135 (manuscript at 16).

147. *Id.* (manuscript at 14–15).

148. *Id.* (manuscript at 17–18).

149. *Id.* (manuscript at 20) (“There are a few isolated examples, but nothing approaching a widespread practice, and states invariably justify unilateral actions under self-defence, rather than reprisals.”).

150. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 6 (1995) (“With new opportunities come new challenges! The questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?”).

151. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

when it distances itself from multilateral institutional arrangements in pursuit of short-term goals.¹⁵²

Some scholars, and perhaps many officials in the governments of strong states, would view such assumptions as misguided. They would characterize over-reliance on the language of the Charter, the equal reliance on *opinio juris* and state practice, and the insistence on giving similar weight to the practices of states small and large as characteristic of international legal formalism derived from a vanished Westphalian world.¹⁵³ Critics of formalism offer instead an instrumental conception of international law as an open system, one in which legal texts are the beginning but not necessarily the end of the conversation.¹⁵⁴ On that account, power and international

152. MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT (Stewart Patrick & Shepard Forman eds., 2002). Kenneth Anderson notes the dependence of the success of extra-Charter policies like “illegal but legitimate” on the absence of opposition, on “a residual, hopeful belief left over from 1990 that the great powers . . . were in essential agreement on such things as mass atrocities.” Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, AM. SOC’Y INT’L L. INSIGHTS (Aug. 30, 2013), <http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks>. He goes on to argue that the United States can no longer count on such acquiescence:

In retrospect, it would probably be more accurate to say that Russia correctly perceived that it lacked the real power to contest Kosovo and simply let it go—without, however, much forgiving or forgetting. In today’s world of rising great powers, BRICS, resurgent China and Russia, the extra-legal political legitimacy that once made this argument plausible as an alternative to a formal legal one is not really evident. Should the United States or its allies act alone, they cannot depend on the same general sense of political legitimacy that NATO could in Kosovo as late as 1999.

Id.

153. For prominent defenses of this approach, see generally MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* (2010); Jutta Brunnée & Stephen J. Toope, *The Use of Force: International Law After Iraq*, 53 INT’L & COMP. L.Q. 785, 800 (2004) (“[H]umanitarian intervention may be maturing into an accepted legal justification for the use of force.”); Michael C. Wood, *Towards New Circumstances in Which the Use of Force May Be Authorized? The Cases of Humanitarian Intervention, Counter-Terrorism, and Weapons of Mass Destruction*, in *THE SECURITY COUNCIL AND THE USE OF FORCE: THEORY AND REALITY—A NEED FOR CHANGE?* 75, 82 (Niels Blokker & Nico Schrijver eds., 2005) (“There are some who advocate a right of ‘humanitarian intervention’, others [including the United Kingdom] who refer rather to an exceptional right to use force to avert an ‘overwhelming humanitarian catastrophe,’ and yet others who deny any such right.”).

154. It is important not to draw this distinction too sharply. Both camps would likely regard authorization by the Security Council as both the most desirable resolution and as dispositive of the question of legitimacy. See Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT’L L. 151 (2013). At least some members of both camps would likely agree that the humanitarian intervention in some situations would be desirable even absent Security Council Authorization. “One may like or dislike this state of affairs, but so *it is under lex lata*.” *Id.* at 162 (quoting Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible*

realpolitik are an integral part of the international “legal” conversation and serve to keep international law relevant in light of the changeable interests of powerful states.¹⁵⁵

For instrumentalists, the moral considerations sketched in Part II.A. amount to arguments of law in favor of intervention. Instrumentalists view intervention in Syria as potentially justified because the formal dictates of international law (those described in the foregoing sections) fail to accommodate the strong moral and/or policy imperatives of powerful international actors and of the international system itself.¹⁵⁶ Certainly the conflict in Syria is a catastrophe. As discussed above, concerns about the protection of individuals from war crimes, crimes against humanity, and massive human rights violations at the hands of the very sovereigns charged with their protection are, or have recently become, issues at the center of international law.¹⁵⁷ The vast majority of states, however,

Humanitarian Countermeasures in the World Community?, 10 EUR. J. INT’L L. 25 (1999)). Where they would differ, crucially, is on the legal effect of their reasons for disliking the prohibition of intervention.

155. See Anderson, *supra* note 152. Anderson notes:

This approach to international law differs from the “illegal but legitimate” way of seeing international law, in that the pragmatic approach views these other factors as part of international law itself, and indeed a vital way of ensuring that international law remains relevant as law to the harsh realities of international politics. It rejects formalism because it wraps these consequences-based, real world concerns into the law itself—and hence offers a view of the law that is still about law, but goes well beyond strict formalism.

Id.

156. Oxford University has prepared an excellent overview of academic writing on the topic of Syria. Because of the fast pace of the debate, much of the conversation took place on blogs or on the online publishing platforms of major journals. *Debate Map: Use of Force Against Syria*, OXFORD PUB. INT’L LAW, http://opil.ouplaw.com/page/debate_map_syria/debate-map-use-of-force-against-syria (last updated Apr. 29, 2014). Instrumentalist conceptions may be found in the arguments of many contributors. Harold Koh offers one of the most powerful arguments in this regard. See Koh, *supra* note 29, at 2 (“[Koh] agree[s] with former British Legal Advisor Sir Daniel Bethlehem that ‘[i]n the case of the law on humanitarian intervention, an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the U.N. Charter, and its related principles of non-intervention and sovereignty, is . . . overly simplistic.’” (quoting Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*, BLOG OF THE EUR. J. INT’L L. (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>)).

157. See Koh, *supra* note 29, at 3 (“A ‘per se illegal’ rule would overlook many other pressing facts of great concern to international law that distinguish Syria from past cases: including the catastrophic humanitarian situation, the likelihood of future atrocities, the grievous nature of already-committed atrocities that amount to crimes against humanity and grave breaches of the Geneva Conventions, the documented deliberate and

would strongly disagree that the ascendance of concern for the individual has displaced concern for the sovereign.¹⁵⁸

One way in which such theories operate is to conflate moral or policy considerations with the law and to resolve any apparent conflict in favor of those considerations even when such a resolution requires unsupportable readings of the law.¹⁵⁹ Such theories do not help to resolve the tension between the competing moral imperatives of intervening to stop atrocities and upholding the rule of law because they hold that the rule of law conforms itself to the moral and policy imperatives of states—or at least certain states. This Article is not the place to hash out, once again, the ongoing debate between competing conceptions of international law. It should suffice to note that the debate exists, and to describe the assumptions underlying the positions taken herein.

F. Conclusion

All of the arguments outlined above attempt to reconcile a deep dissonance. A fundamental norm of international law prohibits the unauthorized use of force even when force would protect other fundamental norms of international law and political morality. Underlying the torturous readings, the pleas to changing custom, the references to a hyper-flexible, quasi-legal conversation, is a sense that international law is too fragile to survive that dissonance. Internal contradictions must be explained away, no matter how convoluted the explanations, because otherwise the strain would cause a breakdown.¹⁶⁰ But this insistence on fragility does a deeper disservice

indiscriminate use of chemical weapons against civilians in a way that threatens a century-old ban, and the growing likelihood of regional insecurity.”).

158. The South Summit notes that:

We reaffirm that in our endeavors we are guided by all the principles and purposes of the United Nations Charter and by full respect for the principles of international law. To this end we uphold the principles of sovereignty and sovereign equality of States, territorial integrity and non intervention in the internal affairs of any State; . . . refrain in international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations

Group of 77 South Summit, *supra* note 119.

159. See generally Koh, *supra* note 29. Koh, for instance, sets up an opposition between “*per se* illegality”—by which he means the clear, strong, and broad prohibition on the use of force in the Charter and in customary international law—and the moral and policy considerations favoring intervention. He reconciles the two by the simple expedient of asserting that the latter trumps the former. *Id.*

160. To continue with the psychological metaphor, that insistence could also be seen as a form of “gaslighting,” where someone is told over and over that they do not see what

to international law by depriving it of the opportunity to confront, and possibly transcend, its contradictions. “Protecting” international law from its perceived weakness keeps it weak, ambiguous, malleable and therefore vulnerable to power.

III. CIVIL DISOBEDIENCE

This Part offers a theory that characterizes an internationally wrongful act as an act of international civil disobedience, or something similar to it, provided that it is *public*, in the sense of transparent (non-secret) and also in the sense of being an act of public reason; *conscientious*; *nonviolent* to the maximum extent possible; and, *loyal to the law* in the sense that the disobedient state accepts the legal consequences of its actions. This sets an appropriately high bar, one that benefits states that choose to meet it but that remain concerned about establishing a permissive precedent.¹⁶¹

Awful choices abound under the analysis in Part II, above. To intervene in Syria, the United States would have to advance a faulty reading of the Charter and/or subsequent custom that purports to find formal justification for some forms of intervention, endorse an instrumentalist conception that subordinates international law to the non-legal judgments of states, ignore the Charter and resurrect the long-dead doctrine of reprisals, or attack without any pretense of justification (“illegal but legitimate”). Each of those choices undermines the prohibition on the use of force and de-legitimizes international law by showing it to be at best unable to constrain the behavior of its subjects or at worst a mask for power. But to refrain from intervening also risks de-legitimizing international law by showing it to be unable to implement the fundamental moral commitments of its constituents in the international community. There is, however, a way not only to avoid the dilemma, but also to ultimately *strengthen* international law.

The solution is to offer a theory based on civil disobedience and use it to design a blueprint for a civilly disobedient and military intervention. Theories of civil disobedience distinguish it from other forms of illegal behavior, such as ordinary offenses (shoplifting, for

they do, in fact, see until they doubt their own perceptions. Into the space created by that doubt steps the “gaslighter,” who by that exercise of power gets to substitute his own vision. Powerful states have much to gain by insisting on the ambiguity and elasticity of international law.

161. Recall that this was explicitly the concern of the United States in Kosovo. Matheson, *supra* note 126.

instance) or rebellion, because it is deeply loyal to the law. That loyalty manifests itself in different ways according to different theorists. For the most part this Article will rely on a Rawlsian theory of civil disobedience. This is in part because his is one of the most widely cited theories,¹⁶² but also because his emphasis on the nature of civil disobedience as an act of public reason offers significant assistance to the attempt to develop a theory that understands the unauthorized use of force by one or more states against another as *supporting* the rule of international law.

Adapting theories of civil disobedience to the international system presents a number of serious problems. Perhaps the most significant is that civil disobedience has generally been understood to be the province of the oppressed, a way for the powerless to affect the powerful. Ascribing the ability to engage in civil disobedience to the world's only superpower, or to other powerful states, clearly cuts against the intuition that it is a tool of the downtrodden. Further complicating the matter, the theory advanced in this Article purports to encompass large-scale violence. Yet civil disobedience is widely thought to require nonviolence.¹⁶³ Although the requirement is not absolute for some, it nonetheless remains a strong preference.¹⁶⁴ Highlighting the relative power differential between protesters and the strong states likely to engage in unauthorized intervention, the latter may well escape legal sanctions for their actions while the former may not. Many of these potential objections stem from the nature of states, as opposed to individuals, as the relevant actors. That states are the actors in the theory outlined herein gives rise to another problem. Civil disobedience so far has been understood as a phenomenon restricted to constitutional democracies where the moral and political consensus underlying the state is sufficiently robust to make moral claims on citizens that compete with the moral

162. See, e.g., *Civil Disobedience*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/civil-disobedience> (last updated Dec. 20, 2013) ("On the most widely accepted account of civil disobedience, famously defended by John Rawls (1971), civil disobedience is a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies."). Even after fifty years, scholars with differing views are careful to distinguish themselves from Rawls. See A. John Simmons, *Disobedience and Its Objects*, 90 B.U. L. REV. 1805, 1809 (2010).

163. See John Rawls, *Definition and Justification of Civil Disobedience*, in CIVIL DISOBEDIENCE IN FOCUS 106 (Hugo Adam Bedau ed., 1991); see also John Morreall, *The Justifiability of Violent Civil Disobedience*, in CIVIL DISOBEDIENCE IN FOCUS, *supra*, at 130, 130; Letter from Birmingham Jail, *supra* note 1.

164. JOSEPH RAZ, *THE AUTHORITY OF LAW* 226–43 (1979); John Morreall, *supra* note 163.

imperative to obey the law. This leaves open the question of whether the international system can be understood to support the practice.

In setting out the theory, the following sections attempt to answer these objections. To the extent that those attempts are unsuccessful, however, the argument also stands as an analogy that draws on some elements of civil disobedience to describe a way in which states may disregard international law in a principled way—even if that principled disregard falls short of the “gold standard” of civil disobedience. Although the term “international civil disobedience” is used frequently on its own, it should be understood in each instance to encompass the “lesser included” standard of principled disregard.

A. Is Civil Disobedience Restricted to Constitutional Democracies?

Civil disobedience is a way to resolve the conflict of duties where, on the one hand, one may have a duty to obey the laws—say, in a constitutional democracy or some other political order with a measure of legitimacy—but where, on the other hand, one may have a competing duty to “defend one’s liberties and . . . oppose injustice.”¹⁶⁵ This is a remarkably similar tension to the one that arises when considering unauthorized intervention in cases of massive human rights abuses. Caution is in order, however. It is always tempting for anyone writing about international law to simply import ideas developed to describe domestic systems into the international sphere. Readers should always view that enterprise with skepticism. International law is different in kind than the national law of states. John Austin famously expressed doubt about the conceptual possibility of international law, since it lacked the character of enforceable commands issued by a sovereign.¹⁶⁶ Other scholars disagree, of course, and Tom Franck argued that international law—then in the early days of its post-Cold War renaissance—had “entered its post-ontological era.”¹⁶⁷ The fundamental difference of international law from other, more recognizable, systems of law is precisely what has given rise to the competing conceptions described above as formalism and instrumentalism. Certainly civil disobedience would be nonsensical under an instrumentalist conception of international law, where there is at best a weak duty to comply with

165. Rawls, *supra* note 163, at 103.

166. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 171 (Wilfrid E. Rumble ed., 1995).

167. FRANCK, *supra* note 150, at 6; *see also* JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

the law. Under that conception there would be no need for an elaborate theory of civil disobedience, or for adherence to the requirements of that theory for the sake of validating the dissenting act.

Whether disobedience can even make any sense in the context of the non-democratic international system must be answered before moving on. Most theorists discuss civil disobedience as something that occurs in a constitutional democracy, and thereby distinguish it from resistance to anti-liberal, oppressive rule.¹⁶⁸ To discern whether international law might nonetheless “qualify” despite its dissimilarities it is worth taking a closer look at *why* constitutional democracies support the practice of civil disobedience. Rawls, for instance, suggests that civil disobedience stems from perceived transgressions of shared fundamental principles of justice:

[T]his theory is designed only for the special case of a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur. Since I assume that a state of near justice requires a democratic regime, the theory concerns the role and the appropriateness of civil disobedience to legitimately established democratic authority.¹⁶⁹

But notice the direction of Rawls’s reasoning here. It does not seem to be constitutional democracy qua constitutional democracy that gives rise to the possibility of civil disobedience. Rather it seems that a nearly just society imperfectly organized according to some basic principles of justice that can be appealed to when that imperfection manifests itself:

[O]ne invokes the commonly shared conception of justice that underlies the political order. It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution. The

168. In cases of oppressive societies, basic freedoms are not respected and equality is not guaranteed. One is free to rebel against such oppression. As Rawls succinctly puts it, “[t]here is no difficulty about such action in this case.” Rawls, *supra* note 163, at 103; *see also* Henry David Thoreau, *Civil Disobedience*, in *CIVIL DISOBEDIENCE IN FOCUS*, *supra* note 163, at 28, 28; Jürgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State*, 30 *BERKELEY J. SOC.* 95 (1985); *see generally* *CIVIL DISOBEDIENCE IN FOCUS* *supra* note 163.

169. Rawls, *supra* note 163, at 103.

persistent and deliberate violation of the basic principles . . . invites either submission or resistance.¹⁷⁰

Constitutional democracy just happened to be the only type of social organization Rawls considered, at the time, to have those features. The question then becomes whether the international system is based on sufficiently shared principles of justice such that when the institutions created to implement them fall short international civil disobedience becomes possible.

Answering that question requires either choosing an existing theory of international law or advancing a new one. The latter is far beyond the scope of this Article. Since his is the most influential account of civil disobedience, it is worth examining whether on Rawls's own account international law would be sufficiently robust to support civil disobedience. However, accepting the possibility of international civil disobedience does not require accepting Rawls's particular theory. Since the possibility of civil disobedience rests on the existence of sufficiently strong and sufficiently shared normative commitments, any theory that would either find those in the abstract (liberal cosmopolitanism) or derive them from social facts (positivism) would suffice. The question of whether such commitments would include military intervention to stop atrocities is, of course, a separate question.¹⁷¹

In *The Law of Peoples*, Rawls takes the position that the international system rests on shared basic principles of justice, from which position it follows that the system is "just enough" to support international civil disobedience. Rawls posits an international original position from which basic principles of justice would emerge that would regulate interactions among peoples.¹⁷² He is quite

170. *Id.* at 106.

171. *See infra* Part IV.

172. For reasons that are not relevant in the present context, Rawls chooses the term "peoples" as opposed to the term "nations." RAWLS, *supra* note 167. For the sake of fidelity Rawls's terminology will be followed here. For a more thorough discussion of the distinction see *id.* *The Law of Peoples* received much criticism. While many are from commentators who doubt the validity of the liberal internationalist enterprise, many are from "internal" critics who justifiably take issue with Rawls's narrow and restrictive list of basic principles and his cursory treatment of the limited set of human rights he recognizes. The intent here is not to endorse Rawls's limited and unnecessarily paternalistic cosmopolitanism but rather to show that the international system as he conceives it supports the practice of civil disobedience as he conceives it—both in the general sense and in the specific case of an otherwise conscientious U.S. military intervention in Syria. See William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT'L L. 255, 294–95 (2010).

cautious about the nature of such principles, and of the type of cooperation they would engender. Specifically he follows Kant, and many others, in believing a world state to be undesirable in theory and impossible in practice. He withholds judgment about what types of institutions a well-organized society of peoples might create, but does note that “there will be many different kinds of organizations subject to the judgment of the Law of Peoples and charged with regulating cooperation among them and meeting certain recognized duties.”¹⁷³ In short, Rawls does not understand the law of peoples as being restricted to a small set of normative commitments (the basic principles of justice) but rather believes that those normative commitments will be implemented through a set of cooperative institutional arrangements. Since it is precisely in the gap between fundamental normative commitments and their implementing institutional arrangements (laws, regulations, and policies) that one finds the justification for civil disobedience, it seems that Rawls might acknowledge the possibility that a specific institutional arrangement—such as, for instance, the voting structure of the Security Council that might frustrate the achievement of one of the basic principles.

Rawls puts forward eight principles for ordering the international basic structure, of which the fourth is particularly important in the present context: “Peoples are to observe the duty of nonintervention (except to address grave violations of human rights).”¹⁷⁴

B. Political and Public

The international system in general supports the practice of international civil disobedience, and R2P in particular describes a moral commitment which, if not implemented, would justify specific acts of disobedience. Importantly, looking at international practice through the lens of civil disobedience allows a shift away from attempts to glean a *legal* justification from the documentary and diplomatic history of R2P and toward a re-reading of that history as evidence of a *common political commitment*. A purely legal analysis restricts one’s attention to the legal texts and to the force of those texts. The nature of customary international law certainly widens the scope beyond written texts by requiring consideration of both the behavior and attitudes of states. But this includes only a very small set

173. RAWLS, *supra* note 167, at 36.

174. *Id.* at 37.

of attitudes, ones that express *opinio juris*. As shown above, there is little to find in that regard, and attempts to read more strongly expressed moral and policy considerations into the law fail insofar as they slide into instrumentalism, subordinate international law to the non-legal judgments of states, and leave interveners open to charges of being more concerned with power than with law. Attempting to understand whether unauthorized military intervention can qualify as international civil disobedience, however, directs attention precisely to the existence and nature of bedrock principles and the extent to which laws and policies reflect them.

The essence of civil disobedience and what distinguishes it from other forms of unlawful activity is that it is, fundamentally, an act of public reason. It is a plea to the majority to reconcile a law, regulation, or policy that is, in the protester's view, contrary to the basic principles of justice to which both the protester and her audience adhere. In the present context that law would be the Charter system's restriction of the use of force to self-defense or intervention authorized by the Security Council, which by its unreasonable restriction of legal discourse to bygone binaries prevents the international community from acting on its deeper commitment to protecting human rights. Civil disobedience is therefore political in the sense that it appeals to common political commitments and not to particular conceptions of the good.¹⁷⁵ Individual religious beliefs, policy preferences, or personal moral preferences would not be sufficient to qualify an unlawful act as civil disobedience.¹⁷⁶ That is because the liberal society of states admits of multiple reasonable conceptions of the good, including several competing religious doctrines, and does not favor one over the other.

Civil disobedience on this view is a liberal rather than a radical act. It seeks to engage with, to reform, but ultimately to uphold the existing order. In contrast, radical action would seek to disrupt, dismantle, and replace the existing order with something else. The disobedient and her audience share similar normative commitments although they may disagree on the appropriate way to implement those commitments. This shared commitment to common norms is an important component of the argument that civil disobedience serves to strengthen and stabilize, rather than harm, the system in which it is deployed.

175. Rawls, *supra* note 163, at 105–06.

176. *Id.* For Martin Luther King, Jr., on the other hand, religious belief certainly justified civil disobedience. Letter from Birmingham Jail, *supra* note 1.

What if any common principles of (international) political morality could be the subject of appeal in an instance of civilly disobedient military intervention?¹⁷⁷ R2P is just such a principle. As shown in Part I.A., above, over the course of two decades nearly every member state of the United Nations has signed on to a series of declarations and resolutions affirming their common commitment to recognizing that *every* member of the international community has an *obligation* to protect civilians from mass atrocities.

There are also reasons in theory to believe that any “just enough” international system would include some version of R2P. Returning to *The Law of Peoples*, Rawls examines the international basic structure, the set of institutions that together comprise the international system.¹⁷⁸ He contends that, just as with any domestic system, the international basic structure must be justified with respect to certain underlying principles. Those principles include the following:

1. Peoples are to observe a duty of non-intervention.
2. Peoples have a right to self-defense but no right to instigate war for reasons other than self-defense.
3. Peoples are to honor human rights.¹⁷⁹

At first glance the principles of non-intervention and self-defense would seem to preclude using military force to remedy gross human rights violations. However, Rawls acknowledges that the list is incomplete. He specifically mentions that “[a] principle such as the fourth—that of non-intervention—will obviously have to be qualified in the general case of outlaw states and grave violation of human rights.”¹⁸⁰ Rawls does not elaborate much on the justifications for humanitarian intervention, but does offer some hints that are particularly relevant in the present context:

Human rights are a class of rights that play a special role in the Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to the regime’s internal autonomy. In this way they reflect the two basic and historically profound changes in how the powers of sovereignty have been conceived since World War II. First, war is no longer an admissible means of government policy

177. In the domestic case, Rawls limits the principles that might give rise to justifiable civil disobedience to violations of equal liberty and fair equality of opportunity, but excludes violations of the difference principle on the basis that violations of the latter are much more difficult to discern. Rawls, *supra* note 163, at 108–09.

178. RAWLS, *supra* note 167.

179. *Id.* at 37.

180. *Id.*

and is justified only in self-defense or, in grave cases of intervention to protect human rights.¹⁸¹

Later he explicitly considers the question of “whether it is ever legitimate to interfere with outlaw states simply because they violate human rights, even though they are not dangerous and aggressive towards other states, and indeed may be quite weak.”¹⁸² He answers in the affirmative: “Is there ever a time when forceful intervention might be called for? If offense’s against human rights are egregious and the society does not respond to the imposition of sanctions, such intervention in the defense of human rights would be acceptable *and would be called for*.”¹⁸³

But civil disobedience is not only concerned with the features of the social system in which it takes place. Equally important is the extent to which the disobedient is acting in good faith.

C. *Conscientiousness*

Good faith, although it stems from the internal state of mind of the actor purporting to be engaged in civil disobedience, must be demonstrated by objective acts indicating conscientiousness. Those include exhausting non-disobedient avenues¹⁸⁴ and being willing to accept the legal consequences of the disobedient act.¹⁸⁵ The conscientiousness requirement in general stems from the nature of civil disobedience as an act of public reason, one that ultimately seeks to support and affirm the system it aims at—unlike radical action or rebellion seeking to dismantle the existing order. That is, as an act of public reason, civil disobedience must be public (non-secret), have a publicly announced justification, and be in furtherance of public principles of justice as opposed to individual moral beliefs or naked self-interest. Since the basic principles of justice are, presumably, openly available, one might assess the conscientiousness of a potential disobedient (in part at least) by the extent to which her announced justification actually conforms to existing principles of justice. But is that enough? What if she is lying?

181. *Id.* at 79.

182. *Id.* at 92.

183. *Id.* at 93 (emphasis added).

184. *See, e.g.,* Rawls, *supra* note 163, at 109–10 (“[T]he normal appeals to the political majority have already been made in good faith and that they have failed.”).

185. *Id.* at 106–07 (“[Civil disobedience] expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by *the willingness to accept the legal consequences of one’s conduct*.” (emphasis added)).

The objective requirements of conscientiousness help the disobedient actor's audience evaluate her sincerity, since no one can know her subjective intent.¹⁸⁶ In the case of international civil disobedience the audience would be the organs of the international system, such as the United Nations, and other states. In front of such an audience, objectively defined criteria of good faith become even more important than in the case of individuals—particularly where the actor claiming conscientiousness is one of the powerful states that tend to engage in unauthorized military intervention. In the case of Syria, for instance, many states have already questioned the good faith of the United States.¹⁸⁷ This is true both in light of its past breaches of the prohibition on the use of force and in light of its persistent refusal to offer a detailed justification of its potential intervention in Syria. Russia and China, for instance, take issue with the extent of military operations in Libya, which in their view, significantly overreached the modest confines of action authorized—with their acquiescence—by the Security Council.¹⁸⁸ They have made it clear that in their view such overreaching constituted bad faith and that the U.S. position on Syria in the Security Council is similarly in bad faith—specifically, that the United States is seeking apparently modest resolutions that it intends to use as the basis, however farfetched, for military intervention.¹⁸⁹ If the United States were to announce its understanding that unauthorized military intervention in Syria is illegal under international law but required by the common moral commitments of the international community, it would sap much of

186. *Id.* at 107 (“No doubt it is possible to imagine a legal system in which conscientious belief that the law is unjust is accepted as a defense for noncompliance. Men of great honesty with full confidence in one another might make such a system work. But as things are, such a scheme would presumably be unstable even in a state of near justice. We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.”).

187. Elizabeth Djinis, *Protestors Argue Against U.S. Intervention in Syria*, DUKE CHRONICLE (Sept. 10, 2013), <http://www.dukechronicle.com/articles/2013/09/10/protesters-argue-against-us-intervention-syria>; Wadah Khanfar, *Syrians Want Rid of President Assad, but Without U.S. Bombs*, GUARDIAN (Sept. 2, 2013), <http://www.theguardian.com/commentisfree/2013/sep/02/syrians-rid-assad-without-us-bombs>; Michael T. Klare, *Why the Push for Syrian Intervention Is About More Than Just Assad*, THE NATION (Sept. 10, 2013), <http://www.thenation.com/article/176100/why-push-syrian-intervention-about-more-just-assad#>.

188. Micah Zenko, *By Overreaching in Libya, NATO Has Left Syria to Fend Alone*, COUNCIL ON FOREIGN REL. (Oct. 11, 2011), <http://www.cfr.org/nato/overreaching-libya-nato-has-left-syria-fend-alone/p26153>.

189. *China, Russia Snub UN Security Council Talks on Syrian Aid*, SOUTH CHINA MORNING POST (Feb. 11, 2014), <http://www.scmp.com/news/china/article/1425867/china-russia-snub-un-security-council-talks-syrian-aid>.

the strength from such accusations. But even with such an announcement, if the United States were to violate international law with impunity it would be extremely difficult to avoid the perception that the military intervention—no matter how well justified as a matter of political morality—was an exercise of unaccountable power.

It is therefore critically important that states purporting to engage in international civil disobedience accept the legal consequences of their disobedient acts. Recall that the theory of international civil disobedience is aimed at states that wish to uphold international law even while responding to moral imperatives that international law inadequately implements. Violating the law with impunity has the opposite effect; instead of demonstrating the disobedient state's fealty to international law, it reinforces widely held perceptions that international law is a weak constraint ultimately subordinate to the preferences of states¹⁹⁰ or simply a disingenuous mask for power.¹⁹¹ The antidote to those critiques, and a necessary—though not sufficient—characteristic of international civil disobedience is therefore that the disobedient state submit voluntarily to international adjudication.

Institively it may not seem to be enough merely to submit to a legal process that may or may not result in sanctions. Certainly Dr. King, as reflected in the opening quotation of this Article, believed that jail time serves the important purpose of highlighting the injustice that was the subject of the protest. But it is not clear that actual sanctions—as opposed to a demonstrated willingness to risk such sanctions—are required for an act to be considered civil disobedience. Conceptually, to the extent that the acceptance of legal consequences is intended to demonstrate fealty to the system then putting oneself at the mercy of that system—whatever the outcome—would certainly demonstrate that fealty. Analogically, it seems unlikely that we would take away from protesters who take to the streets the mantle of civil disobedient simply because the city where they were protesting chose to “catch and release” rather than press charges. The United States might therefore be understood to satisfy this criterion by submitting itself to the jurisdiction of the ICJ,

190. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2d ed. 1954); GEORG SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* (1962); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940).

191. CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* (2003).

even if the ICJ ultimately imposes no sanction. As discussed in more detail below, this can be accomplished by accepting the jurisdiction of the ICJ for disputes arising from the unauthorized military intervention.

None of the foregoing guarantees that all acts of international civil disobedience will be undertaken in good faith. Neither this suggestion nor civil disobedience theories more generally can fully account for instances where someone is lying about the justification for their actions or has ulterior motives for undertaking the conduct in question. But the requirements of civil disobedience, taken as a whole, set an extremely high bar for the conduct of either persons or states. Someone (or some state) acting in bad faith would, one imagines, find it difficult to declare their justification—publicly broadcasting a lie far and wide—and to submit, again publicly, to adjudication of those acts. Furthermore, in the case of international law, a state that lies about the justification for its actions risks contributing to the creation of new customary international law based on its untruthful *opinio juris*—an outcome it would likely wish to avoid. But even if a state believes in good faith that unauthorized military intervention is necessary to vindicate important shared principles of international justice, can violent civil disobedience *ever* be justified?

D. (Non) Violent?

If R2P qualifies as a basic principle of justice, and the principle itself contemplates violence under some circumstances, then violent international civil disobedience in support of that principle must, at least under some circumstances, be justified. That position runs contrary to much of the thinking on civil disobedience,¹⁹² although a minority view holds violence to be at least sometimes justified.¹⁹³ The hesitation of theorists opposed to violence, however, seems to be more a strong presumption than an a priori position that it is categorically prohibited.¹⁹⁴ The question then becomes whether that presumption can be overcome.

192. See, e.g., MAHATMA GANDHI, ALL MEN ARE BROTHERS 85–107 (Krishna Kripalani ed., 2d ed. 1969); Rawls, *supra* note 163; see generally Letter from Birmingham Jail, *supra* note 1; CIVIL DISOBEDIENCE IN FOCUS, *supra* note 163.

193. Joseph Raz, for instance, raised the question of why, if an act of civil disobedience were to be justified at all—a very high bar, considering the inherent illegality of the act—violence would automatically be unjustified. Joseph Raz, *Civil Disobedience*, in CIVIL DISOBEDIENCE IN FOCUS, *supra* note 163, at 159.

194. Rawls, for instance, takes violence to obscure the communicative nature of the act:

A novel question for civil disobedience theory, which arises from the case of the United States and Syria, suggests how the presumption against violence might be overcome: What if basic principles of justice *required* violence, and the law *prohibited* that required violence?¹⁹⁵ Suppose, for instance, that in the Jim Crow South a county or municipality passed a law prohibiting third parties from interfering with a lynching. Suppose further that outraged locals formed an anti-lynch mob with the publicly expressed intention to forcibly prevent any further lynching in that town. If the anti-lynch mob violently clashed with a lynch mob, succeeding in rescuing the potential victim, would that violence obscure the communicative nature of the rescue? Suppose the lynch mob was ready for its opponents, who were arrested after a scuffle, and that the murder then proceeded as planned. It seems counterintuitive to assert that being arrested in the course of trying to prevent a cold-blooded murder would not be at least as communicative of the absurdity of the law as would an unsanctioned protest on the steps of City Hall. If the members of the anti-lynch mob then stood trial and accepted the legal consequences of their actions, would the fact of their violence undermine their claim to fealty to the law?

On this view the Assad regime's murder of tens of thousands of civilians and its displacement of millions more create a moral obligation, stemming from fundamental principles of justice, to use violence. The implementation of that obligation is frustrated by the operation of law. Surely in such a situation accomplishing the violence required by principle but prevented by law would *demonstrate*, rather than *detract from*, fidelity to the rule of law?

[Civil disobedience] tries to avoid the use of violence, especially against persons, not from the abhorrence of the use of force in principle, but because it is a final expression of one's case. To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.

Rawls, *supra* note 163, at 106. Habermas is also concerned with the communicative nature of civil disobedience (which he terms "symbolic") and similarly eschews violence. Habermas, *supra* note 168.

195. Although early Rawls opposed violent civil disobedience, later Rawls argued that some basic principles of justice require it. See Rawls, *supra* note 163, at 106 ("To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address."). *The Law of Peoples* explicitly lists violence against illiberal regimes committing massive human rights violations as a basic principle of international justice. RAWLS, *supra* note 167, at 93–94 n.6 ("Is there ever a time when more forceful intervention might be called for? If the offenses against human rights are egregious and the society does not respond the imposition of sanctions, such intervention in defense of human rights would be acceptable and would be called for."). Rawls's own position in *The Law of Peoples* therefore casts doubt on the applicability of his objection, on the grounds of fidelity, to violent civil disobedience.

E. Conclusion

Civil disobedience stabilizes and strengthens the system of which it is a part. “Indeed, civil disobedience . . . is one of the stabilizing devices of a constitutional system, although by definition an illegal one.”¹⁹⁶ In that sense international civil disobedience is the opposite of the move to define away problematic applications of international law; to argue for the possibility of international civil disobedience is to argue that international law is robust enough to confront its contradictions head on. The stabilizing effect stems from the distinguishing feature of an almost just society, as opposed to, for instance, a monarchy based on divine right or an illiberal society based on autocratic rule: the free and freely chosen cooperation among individuals garnered by the attractiveness of shared basic principles of justice.¹⁹⁷ A consequence of basing a society on such freely chosen cooperation is the freedom of individual members of that society to express their discontent with the current form of that cooperation. But that is not to say that members of constitutional democracies, or states in the international system, are free to disobey the law at any time or for any reason. That would negate the concept of law and undermine fidelity to the rule of law. Rather, it is to say that when specific institutional expressions of that core agreement divert from its content, then actors should be free to disagree. The following Part will outline just what such a disagreement would look like under the theory of international civil disobedience.

IV. BLUEPRINT FOR CIVILLY DISOBEDIENT MILITARY INTERVENTION

Had the United States done nothing differently than it did, except followed through with its intention of using force against Syria, that act would already have shared many of the above-described characteristics of civil disobedience. It would have been transparent, at least arguably within the boundaries of qualifying violence, conscientious, and public in the sense of transparency. But it would not, without more, have been public in the sense of a communicative act designed to perfect a mostly just system, nor would it have served to strengthen the rule of law. This Part will sketch some ideas about what more the United States, or any potential future belligerent, could do to make sure its acts are understood to be international civil disobedience and thereby preserve the rule of international law in the face of extra-Charter violence.

196. Rawls, *supra* note 163, at 114; *see also* Habermas, *supra* note 168, at 95–116.

197. Rawls, *supra* note 163, at 114.

A. Going Public

To qualify unauthorized military intervention in Syria as civil disobedience, the United States would need to make it clear to the world that its actions were motivated by public principles of justice as opposed to private morality, policy, or naked self-interest. As a preliminary matter, that would require the Obama administration to release a detailed justification for military intervention, something that at the time of this writing it has not done.¹⁹⁸ The world has therefore been left to puzzle out possible justifications based on hints dropped by a number of officials in speeches and interviews.

The next question would then be whether the United States would be “invok[ing] the commonly shared conception of justice that underlies the political order.”¹⁹⁹ This narrows the options for the United States. President Obama’s contention, for instance, that the Assad regime’s use of chemical weapons would justify the use of force to degrade its ability to do so and to deter future use would not likely pass muster unless an argument could be constructed that the international community has come together to reintroduce the principle of armed reprisals. This is where reframing the history of humanitarian intervention and R2P as the emergence of a *moral* principle rather than a *legal* one pays off.²⁰⁰ R2P can be understood as the articulation by the international community of one of its core principles. Certainly, proponents of the doctrine see it that way.

B. Accepting the Consequences

To demonstrate its fidelity to the law, the United States would need to accept the legal consequences of conducting unauthorized military interventions against Syria. The most straightforward way for it to do that would be to accept the jurisdiction of the ICJ for contentious cases arising from its intervention, but the ICJ is far from the only possible forum. A brief review of practice in the twentieth century reveals several creative approaches to interstate dispute

198. Koh, *supra* note 29 (“Given the importance of the issue, it is critically important that the Obama Administration soon issue its detailed legal opinion elaborating her view. Why not explain—not just in lay terms as President Obama recently did, but in legal language that international lawyers can debate (as the U.K.’s Attorney General did in Syria and in Kosovo)—why a limited use of force in extraordinary circumstances can fit within a legitimate process of reconstructing international law?”).

199. Rawls, *supra* note 163, at 106. Recall that for Rawls this is a very high standard—he even excluded his own difference principle from consideration as a motivation for justified civil disobedience. *Id.*

200. See *supra* Part II.A.

resolution. Since the theory of civil disobedience calls for fidelity to the law, and not necessarily to any particular legal institution, the United States would seem to be free to choose the forum.²⁰¹ The ICJ is, however, the “principal judicial organ of the United Nations”²⁰² and it provides an authoritative and ready-made forum. Acceptance of the jurisdiction of the ICJ is voluntary,²⁰³ and neither the United States nor Syria has agreed to compulsory jurisdiction.²⁰⁴

Submission of a dispute to the ICJ would therefore require an affirmative act on the part of the United States (and also on the part of Syria, but we are here concerned only with understanding how the United States might engage in international civil disobedience). Such an affirmative act would significantly strengthen the claim of the United States to fealty to the law. One way for the case to come to the ICJ would be through a special agreement where the parties (the United States and Syria) jointly refer the case to the Court as contemplated under Article 36(1) of the Statute of the International Court of Justice (“the Statute”).²⁰⁵ But that option has the drawback of requiring the United States to negotiate with Syria, which might be difficult in the aftermath of an attack. In the alternative, the United States could make a declaration under the Optional Clause of the Statute (Art. 36 paragraph 2),²⁰⁶ which would allow it to tailor its acceptance of the jurisdiction of the Court to cover only the timeframe of its unauthorized intervention, only disputes arising from

201. Some choices, such as international arbitration, would also give the parties control over the applicable law. It is an interesting question, albeit one beyond the scope of this Article, the extent to which the United States could modify the applicable law and still be said to be expressing fealty to it. And what role would Syria’s hypothetical consensus have on that question?

202. ICJ Statute, *supra* note 101, 59 Stat. at 1055.

203. Article 36 of the ICJ’s Statute provides, in pertinent part, that:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

Id. at 1060.

204. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> (last visited Oct. 12, 2014).

205. ICJ Statute, *supra* note 101, 59 Stat. at 1060.

206. *Id.*

that intervention, only disputes initiated by Syria, or any combination of those or other conditions.²⁰⁷ Even if Syria never initiated proceedings, the United States would satisfy the criterion of accepting the legal consequences of its acts by opening itself up to the jurisdiction of the Court, since if Syria did bring a case, the United States would be compelled to participate.

In any case before the ICJ, the United States would have to concede the unlawfulness of its actions but could at the same time argue that it should not have to pay damages to Syria because the latter would lack standing based on the doctrine of unclean hands. The concept of civil disobedience requires the disobedient actor to believe that her action is, in fact, illegal,²⁰⁸ and the analysis provided above in Part II shows that to be the case. Furthermore, the very nature of customary international law requires a state concerned to maintain the cohesion of the prohibition on the use of force to avoid appearing to endorse its customary modification. That is because customary international law changes only over time and only once a general practice and accompanying *opinio juris* have crystallized, which necessarily implies a period of experimentation during which states would use force illegally.²⁰⁹ To change customary international law you have to break existing international law.²¹⁰ Weakening the

207. The plain text of Articles 36(2) and 36(3) might give the impression that a state can only impose certain narrow restrictions on its acceptance. However,

[t]he two World Courts have never taken such a restrictive view. From the early days of the PCIJ, States engaged in a practice of carefully defined reservations suiting their individual needs, as perceived by them. . . . In sum, the freedom of States to confine the scope of their declarations . . . may perhaps have certain ultimate limitations, but such limitations are no more than a theoretical construct, lacking any relevance in practice.

THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 683 (Andreas Zimmermann et al. eds., 2d ed. 2012).

208. Rawls noted that “the civilly disobedient act is indeed thought to be contrary to law, at least in the sense that those engaged in it are not simply presenting a test case for a constitutional decision; they are prepared to oppose the statute even if it should be upheld.” Rawls, *supra* note 163 at 105.

209. Koh, *supra* note 29 (“In the future, other less-humanitarian minded states can cite Obama’s threat and put their own broad spin on the legal interpretation, to use the murky concepts of humanitarian intervention and R2P for their own self-interested purposes.”). Koh is here referring to the result of conducting unauthorized humanitarian intervention without announcing any justification, but it would apply equally well to the likely extended period of time where customary international law was in the process of evolving.

210. See Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 136 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (“[H]eavy reliance on customary law, absence of a sovereign universal legislature, and the obvious limitations of the treaty process together result in a system in which reform without illegality is more difficult than in domestic systems.”).

prohibition on the use of force in that way is precisely the result the theory presented in this Article seeks to avoid. By acknowledging the illegality of its actions under international law, and highlighting the incompatibility of that illegality with the principle of R2P, the United States would “arouse the conscience of the [international] community over its injustice”²¹¹ and thereby hasten other avenues of legal reform. But acknowledging responsibility does not necessarily mean that the United States would have to pay damages to Syria.

The United States could argue that the doctrine of “clean hands” bars Syria’s claims for damages even if the United States conceded responsibility.²¹² Although the principle is not universally understood to apply in international law, the Court has applied versions of it in the past, and has never declared it inapplicable despite several opportunities to do so. As Stephen Schwebel, himself a former judge on the ICJ, nominated by the United States, noted:

The following conclusions may be drawn from the foregoing cases in which an argument of clean hands has been invoked: (a) a number of States have maintained the vitality and applicability of the principle of clean hands in inter-State disputes; and (b) the ICJ has not rejected the principle though it has generally failed to apply it. In the *Meuse Water* case, the PCIJ embraced a related principle, and in the *Case concerning the Gabčíkovo-Nagymaros Project*, the ICJ gave expression to the principle *ex injuria jus non oritur*.²¹³

Others are less cautious.²¹⁴ Clearly Syria’s hands are “odiously unclean.” The Assad regime has repeatedly violated international

211. Letter from Birmingham Jail, *supra* note 1.

212. See BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 156 (Stevens & Sons 1953) (“A Party who asks for redress must present himself with clean hands.”); Rahim Moloo, *A Comment on the Clean Hands Doctrine in International Law*, 7 INTER ALIA 39, 39 (2010).

213. STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW: FURTHER SELECTED WRITINGS 300–01 (2011); see also HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 420–21 (1947) (“The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer.”).

214. Schwebel himself endorsed the principle much more strongly in his dissenting opinion in *Nicaragua*. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 268 (June 27) (Schwebel, J., dissenting) (“Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction . . . Nicaragua’s hands are odiously unclean . . . Thus . . . Nicaragua’s claims against the United States should fail.”); see also Special Rapporteur on Diplomatic Protection, *Sixth Rep. on Diplomatic Protection*, ¶ 6, Int’l Law Comm’n, U.N. Doc. A/CN.4/546 (Aug. 11, 2004) (by John Dugard) (“The . . . cases make it difficult to sustain

law, thereby creating the very situation that invited intervention (according to a principle that Syria itself agreed to on more than one occasion).²¹⁵ The United States would therefore be in a position to argue that Syria should not have the standing to claim damages for acts occasioned by its own illegal conduct.²¹⁶ If ever the Court were to reject a state's standing for unclean hands, the case of Syria or, by implication, of future states subject to unauthorized military intervention to stop mass atrocities, would be the opportune time to do so.

C. But Is It Practicable?

Following the blueprint set forth above would offer several practical benefits to the United States. Setting international civil disobedience as the standard for justified unauthorized military intervention would set a high bar for other states to follow and would serve as a deterrent for states acting in bad faith. The Court's rejection of Syria's standing for unclean hands would not only save the United States from the paradoxical result of having to pay to rebuild that which it had just destroyed, but it would also serve as a moral vindication for the United States; a vindication in which one could imagine other international bodies and members of the international community joining.²¹⁷ That victory would arouse the conscience of the international community, would grant the United States the moral high ground in future discussion about the use of force, and would allow it to lead the way to a more just institutional arrangement.

Furthermore, acknowledging the illegality of its unauthorized military intervention would be the only way for the United States to maintain the status quo while reform efforts are underway. The hesitation of the United States to publicly announce a *legal*, as

the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations.”).

215. Recall that the World Summit Outcome was a consensual resolution. *See supra* Part II.A.

216. “Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.” Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, in 92 RECUEIL DES COURS 1, 119 (1957) (emphasis added).

217. Tom Franck argued that the international community already exercises this approval (or disapproval where warranted) of unauthorized interventions, and that in that way it functions as something analogous to a jury. FRANCK, *supra* note 11.

opposed to *moral* or *policy* justification for attacking either Kosovo or Syria (saying that there is such a justification, but refusing to share it, does not count) could be read as a desire to prevent other states from using it as a basis to launch their own attacks. But as the continuing debates generated by Kosovo have shown, intervening without announcing a justification creates ambiguity. Intervening while announcing a specious justification, on the other hand, would tarnish the reputation of the United States as a law abiding member of the international community, undermine the prohibition on the use of force, and risk the specious justification acquiring the status of customary international law. Only acknowledging that the intervention is illegal removes ambiguity while blocking the emergence of new customary international law.

V. CONCLUSION

States do not have to choose between the apparently conflicting moral imperatives to stop mass atrocities and to uphold the rule of law. Rather, they can engage in international civil disobedience, or the principled disregard of international law, and thereby “break[]” international law while “expressing the highest respect for [international] law.”²¹⁸ This is not a permissive standard, however. Engaging in international civil disobedience requires states to be public and transparent about their motivations, to demonstrate good faith by appealing only to basic shared principles of justice (and not to self-interest), and to accept the legal consequences of their actions by submitting to the jurisdiction of the ICJ (or another adjudicatory body). The ICJ, for its part, would be called on to determine whether the target state committed mass atrocities that precluded its recovery, based on the principle of clean hands, despite the illegality of the intervention.

The theory set forth in this Article, if put into practice by the United States and other states that might be tempted to engage in unauthorized military intervention, would have a profound effect on the world order. The U.S. Department of State was divided on intervention in Kosovo. The policy officials wanted it but the legal officers refused to certify its legality.²¹⁹ The result was also divided—an intervention with a justification in policy but not in law. In turn, that divided result gave rise to persistent ambiguity and confusion

218. Letter from Birmingham Jail, *supra* note 1.

219. David Kaye, who served at the time in the Office of the Legal Adviser (though not on the Kosovo issue), has recently written about this. *See* Kaye, *supra* note 91.

about a norm that should be sharp and clear: the prohibition on the use of force. Removing that division and clarifying that ambiguity might encourage more intervention by well-intentioned states while setting the bar too high for ill-intentioned states to meet. Undertaking unauthorized military intervention as international civil disobedience will remove the whiff of illegitimacy that has always accompanied the practice and strengthen the international community's ability to stop mass atrocities and end the conflicts that give rise to them.

